

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

2012 MSPB 59

Docket No. CB-1205-10-0024-U-1

**National Treasury Employees Union,
Petitioner,**

v.

**Office of Personnel Management,
Agency.**

April 25, 2012

Gregory O’Duden, Esquire, Larry J. Adkins, Esquire, and Richard Bialczak, Esquire, Washington, D.C., for the petitioner.

Kathie A. Whipple, Esquire, and Joanna S. Abrahams, Esquire, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman

OPINION AND ORDER

¶1 Petitioner National Treasury Employees Union (NTEU) requests that the Board review an Office of Personnel Management (OPM) qualification standard and its application by the Internal Revenue Service (IRS). For the reasons set forth below, we DENY the petitioner’s request.

BACKGROUND

¶2 The OPM Qualification Standards Operating Manual for General Schedule Positions (Manual) contains the policies, instructions, and standards used to

determine the qualifications of applicants for General Schedule positions in the competitive service. *See Brown v. Office of Personnel Management*, [91 M.S.P.R. 314](#), ¶ 2 (2002) (citing the Manual, Part A). The Manual identifies qualification standards by grade for various occupational series. *Id.* Generally, these qualification standards consist of education, training, and/or experience requirements. *Id.*

¶3 Prior to 1994, the qualification standard for Internal Revenue Agent, GS-512 series, included a requirement that applicants have 24 semester hours of accounting education. In 1994, OPM modified the qualification standard to require that candidates have 30 semester hours of accounting education *or* 24 semester hours in accounting and an additional 6 semester hours in related subjects such as business law, economics, statistical/quantitative methods, computerized accounting or financial systems, financial management, or finance. Request File (RF), Tab 3 at 1-2 & subtab 1. A 1995 letter of understanding between the IRS and the NTEU stated that “[e]mployees currently serving or having previously served in a GS-512 series position *will not have to meet* the increased education requirement.” *Id.*, subtab 2 (letter from Ray Woolner, IRS, to Steven Payne, NTEU, dated April 4, 1995) (emphasis in original).

¶4 The NTEU challenged the qualification standard through the grievance process and prevailed before an arbitrator who found, *inter alia*, that the 30-semester-hour requirement violated [5 U.S.C. § 3308](#). RF, Tab 3, subtab 4 at 36 (Opinion and Award of Carlton J. Snow dated July 9, 2004). On interlocutory review, the Federal Labor Relations Authority (FLRA) held that neither the arbitrator nor the FLRA had the power to assess the validity of an OPM regulation. *National Treasury Employees Union and Internal Revenue Service*, 60 F.L.R.A. 782 (2005). Therefore, the FLRA set aside the portion of the arbitrator’s award that found the qualification standard to be invalid. *Id.*

¶5 In the instant request for regulation review, the NTEU asks the Board to review and invalidate the qualification standard based on the allegation that the

30-hour educational requirement violates [5 U.S.C. § 3308](#) and would cause an IRS employee to commit a prohibited personnel practice. RF, Tab 3. OPM responds that the Board should deny the request because a qualification standard is not a rule or regulation and because the issue could be raised through ordinary channels of appeal. RF, Tab 6.

ANALYSIS

Jurisdiction

¶6 The Board has original jurisdiction to review rules and regulations promulgated by OPM. [5 U.S.C. § 1204\(f\)](#). In exercising its jurisdiction, the Board is authorized to declare an OPM rule or regulation invalid on its face if the Board determines that such provision would, if implemented by any agency, on its face, require any employee to violate a prohibited personnel practice as defined by [5 U.S.C. § 2302\(b\)](#). *Id.* at § 1204(f)(2)(A). Similarly, the Board has the authority to determine that an OPM regulation has been invalidly implemented by an agency if the Board determines that such provision, as it has been implemented by the agency through any personnel action taken by the agency or through any policy adopted by the agency in conformity with such provision, has required any employee to violate a prohibited personnel practice. *Id.* at § 1204(f)(2)(B). *See Prewitt v. Merit Systems Protection Board*, [133 F.3d 885](#), 887 (Fed. Cir. 1998).

¶7 Here, the NTEU has identified the 30-semester-hour educational requirement for the Revenue Agent series as the OPM “rule”¹ at issue. RF, Tab 3 at 4-5. The NTEU alleges that the prospective application of the educational

¹ OPM argues that a qualification standard is not a “rule.” RF, Tab 6 at 3-4. We assume, without deciding, that the 30-hour educational requirement is a “rule” for purposes of this decision. *See, e.g., Brown*, [91 M.S.P.R. 314](#), ¶¶ 5-8 (declining to review a qualification standard without deciding whether it is a “rule”); *Johnson v. Office of Personnel Management*, [31 M.S.P.R. 104](#), 106 (1986) (assuming, arguendo, that the Qualifications Handbook is a rule or regulation).

requirement violates [5 U.S.C. § 3308](#), and that this violation in turn causes the implementation of a prohibited personnel practice in violation of [5 U.S.C. § 2302\(b\)\(12\)](#). *Id.* at 12-13. Section 2302(b)(12) prohibits taking or failing to take a personnel action if doing so violates any law, rule, or regulation implementing, or directly concerning, the merit system principles. The NTEU contends that the disqualification of candidates for the Internal Revenue Agent position based on an invalid educational requirement necessarily concerns the merits systems principles at [5 U.S.C. § 2301\(b\)\(1\)](#), concerning recruitment, and (b)(8), which protects employees from arbitrary actions taken for partisan political purposes and interference with elections. *Id.* at 12, 14-15. The NTEU further alleges that the educational standard violates [5 U.S.C. § 2302\(b\)\(4\)](#), which prohibits deceiving or willfully obstructing any person with respect to such person's right to compete for employment. *Id.* at 13, 16-17. Without determining the merits of these contentions, we conclude that the NTEU has made nonfrivolous allegations establishing a claim within the Board's jurisdiction under 5 U.S.C. § 1204(f).

Exercise of Discretion

¶8 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.

¶9 The issue raised in this regulation review request could be timely reached through an appeal brought under OPM's employment practice regulations. The Board has jurisdiction over appeals filed pursuant to [5 C.F.R. § 300.104\(a\)](#), which provides the Board with authority to hear an appeal from "[a] candidate who believes that an employment practice which was applied to him or her by the

Office of Personnel Management violates a basic requirement in § 300.103.” OPM has defined the term “employment practices” to include “the development and use of examinations, *qualifications standards*, tests, and other measurement instruments.” [5 C.F.R. § 300.101](#) (emphasis supplied). OPM asserts that, if the NTEU’s claim were raised in an employment practices appeal, “the issue of the validity of OPM’s qualification standard or IRS’s use of it may be raised in the context of a concrete case and controversy with a fully-developed record.” RF, Tab 6 at 5-6. We agree. The Board has held that it has jurisdiction over challenges to educational requirements pursuant to the employment practices regulations. *See, e.g., Sauser v. Department of Veterans Affairs*, [113 M.S.P.R. 403](#), ¶ 9 (2010); *Mapstone v. Department of the Interior*, [106 M.S.P.R. 691](#), ¶¶ 13-15 (2007); *see also 5 C.F.R. § 300.103*(b) (noting, with respect to employment practices, that a minimum education requirement may not be established except as authorized under [5 U.S.C. § 3308](#)). The NTEU replies that it is unable to file an employment practices appeal because it is not a “candidate” with the right to appeal under [5 C.F.R. § 300.104](#)(a). RF, Tab 7 at 5. Nevertheless, the NTEU admittedly “represents Revenue Agents and other IRS employees who may wish to apply for one of thousands of Revenue Agent positions.” RF, Tab 3 at 4. In that capacity, the NTEU would be in a position to raise the very claim it has presented here in an employment practices appeal with a factually-developed record.

¶10 Furthermore, equivalent remedies are available in an appeal brought under the employment practices regulations. Pursuant to that authority, the Board may determine that an OPM qualification standard is invalid and order OPM to no longer apply it. *See, e.g., Morris v. Office of Personnel Management*, [14 M.S.P.R. 578](#), 581 (1983) (ordering OPM to reevaluate the appellant’s qualifications for eligibility as an Electronic Engineer without considering an improper qualification standard).

¶11 We find that the third *McDiarmid* factor -- the extent of the regulation's application -- weighs in favor of review. The educational requirement applies to all applicants for the Revenue Agent position at IRS offices nationwide, and therefore appears to be broad enough to warrant our review. *Cf. Brown*, [91 M.S.P.R. 314](#) ¶ 5 (finding that the challenged rule had “very limited application” because it applied only to “one installation of one Federal agency.”).

¶12 With respect to the fourth and final factor, the NTEU has not presented a strong argument that the educational requirement is invalid. The statute at issue here, [5 U.S.C. § 3308](#), provides as follows:

The Office of Personnel Management or other examining agency may not prescribe a minimum educational requirement for an examination for the competitive service except when the Office decides that the duties of a scientific, technical, or professional position cannot be performed by an individual who does not have a prescribed minimum education. The Office shall make the reasons for its decision under this section a part of its public records.

While the provision generally prohibits the prescription of minimum educational requirements, it plainly authorizes OPM to make an exception for “scientific, technical, or professional position[s]” whose duties “cannot be performed by an individual who does not have a prescribed minimum education.”² *Burroughs v. Department of the Army*, [115 M.S.P.R. 656](#) ¶ 12, *aff'd*, 445 F. App'x 342 (Fed. Cir. 2011). OPM considers the Revenue Agent series a professional position, *see* <http://main.opm.gov/qualifications/Standards/group-stds/gs-prof.asp>, and the NTEU does not dispute that classification. Moreover, there is no evidence upon which to conclude that OPM's reasons for increasing the educational requirement for entry into that position were either patently unfounded or arbitrary. *See* RF, Tab 3, subtab 1.

² In its response, OPM does not address the proper interpretation of [5 U.S.C. § 3308](#). RF, Tab 6.

¶13 Instead, the NTEU argues that the 30-semester-hour educational requirement violates [5 U.S.C. § 3308](#) based on a 1995 letter of understanding between the IRS and the NTEU in which the IRS agreed that current and former employees, who may have been hired under the previous 24-semester-hour educational requirement, would not be subject to the new 30-semester-hour requirement. RF, Tab 6, Subtab 2. The NTEU asserts that the “IRS’ decision in 1995 to ‘grandfather’ incumbents still constitutes irrefutable evidence of its acknowledgement that Revenue Agent duties *can be performed* by employees who have not completed 30 hours of accounting credits.” RF, Tab 3 at 12 (emphasis in original).

¶14 We find this argument unpersuasive. OPM’s qualification standards state specific educational requirements for *entry* into an occupation. *See Brown*, [91 M.S.P.R. 314](#), ¶ 2 (qualifications standards are “used to help determine the qualifications of applicants for Federal employment”). The 1995 letter of understanding simply “grandfathered” employees who had on-the-job experience. Under the NTEU’s view, OPM would be prohibited from increasing an educational requirement for applicants to a scientific, technical, or professional position unless those same enhanced educational requirements were retroactively applied to current employees. Section 3308, in authorizing OPM to prescribe minimum educational requirements, does not state that the requirements must also be applied to current employees, and the NTEU has not identified any legislative history or case law that supports such an interpretation.

¶15 Taken as a whole, the *McDiarmid* factors weigh against review. The likelihood that the issue will be timely reached through ordinary channels of appeal, the availability of other equivalent remedies, and the weakness of the NTEU’s arguments persuade us not to exercise our discretion to review the 30-semester-hour educational requirement. *McDiarmid*, 19 M.S.P.R. at 349.

ORDER

¶16 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\(c\)](#)).

FOR THE BOARD:

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