UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2014 MSPB 22

Docket No. PH-0752-13-0236-I-1

Paul D. Jonson,

Appellant,

v.

Federal Deposit Insurance Corporation,

Agency.

March 28, 2014

Paul J. Adams, Esquire, Brockton, Massachusetts, for the appellant.

Judith H. Thomsen, Esquire, New York, New York, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member
Member Robbins issues a separate dissenting opinion.

OPINION AND ORDER

¶1 On June 27, 2013, the administrative judge stayed the proceedings in this appeal and certified six issues for interlocutory appeal relating to the removal of an employee of the Federal Deposit Insurance Corporation (FDIC) charged with defalcation of obligations in excess of $50,000 that he owed to FDIC-insured institutions. For the reasons discussed below, we AFFIRM the ruling on three of the certified issues, agreeing with the administrative judge that: (1) the FDIC was authorized to promulgate regulations concerning employee conduct; (2) the FDIC was required to obtain the concurrence of the Office of Government Ethics

(OGE) before promulgating such regulations but such concurrence was not obtained; and (3) the Board has jurisdiction to review the adverse action issued to the appellant, including the penalty. We do not reach the remaining three issues certified for interlocutory appeal. Instead, we REVERSE the appellant's removal because it was based on regulations promulgated without the required OGE approval, VACATE the order that stayed the processing of the appeal, and RETURN this case to the Northeastern Regional Office for further adjudication consistent with this decision.

BACKGROUND

¶2 The appellant, a full-time competitive-service employee, was removed from his position as Case Manager, CG-14, effective February 1, 2013, for failure to meet the minimum standards for employment with the FDIC. Initial Appeal File (IAF), Tab 4 at 80, 123-27 of 129. Citing to its own regulations regarding minimum standards of fitness for employment, located at 12 C.F.R. Part 336, Subpart B, the FDIC concluded that the appellant failed to satisfy eight separate debts to FDIC-insured institutions, resulting in "a pattern or practice of defalcation," conduct which is prohibited by 12 C.F.R. § 336.5(a)(3). IAF, Tab 4 at 124-26. A pattern or practice of defalcation is defined in the subject regulations, in pertinent part, as "[a] history of financial irresponsibility with regard to debts owed to insured depository institutions which are in default in excess of $50,000 in the aggregate." 12 C.F.R. § 336.3(i)(1). These regulations mandate removal for employees engaged in a pattern or practice of defalcation. 12 C.F.R. §§ 336.3(i), 336.5(a)(3) & (b), 336.8(b). The regulations further provide that the FDIC's determination is at its "sole discretion" and "not . . . subject to further review." 12 C.F.R. § 336.9.

¶3 The appellant filed the instant appeal claiming, in pertinent part, that the cited regulations were not properly promulgated and that the term defalcation was defined too broadly in the regulations. IAF, Tab 1. The administrative judge

explained to the parties that there were a number of issues in dispute and provided the parties with an opportunity to brief the issues. IAF, Tab 7. After receiving the parties' submissions, the administrative judge issued an order deciding these issues, as follows:

> 1. Pursuant to the Resolution Trust Corporation Completion Act (codified at 12 U.S.C. § 1822), the FDIC was authorized by Congress to promulgate minimum standards for employment, which are set forth in 12 C.F.R. § 336.5;
> 2. The FDIC was required to obtain concurrence from the Office of Government Ethics before enacting 12 C.F.R. Part 336;
> 3. The FDIC defined the word "defalcation" in 12 C.F.R. Part 336 more broadly than is utilized in the Bankruptcy Code;
> 4. The FDIC was permitted to utilize a more expansive definition of the word "defalcation";
> 5. If the FDIC establishes by preponderant evidence that the appellant violated 12 C.F.R. Part 336, such a violation would not necessarily subject him to mandatory removal as prescribed in 12 C.F.R. § 336.8; and
> 6. The Board has jurisdiction over the appeal of the adverse employment action suffered by the appellant, including a determination regarding the reasonableness of the penalty in light of the criteria and exceptions set forth in 12 C.F.R. Part 336.

IAF, Tabs 12, 16.

¶4 The administrative judge invited the parties to advise her if they wished to move for certification of an interlocutory appeal concerning her rulings. IAF, Tab 12 at 8; *see* 5 C.F.R. §§ 1201.91-.93. The FDIC moved for certification.[1]

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[1] In March 2014, more than 8 months after its motion for certification was granted, the FDIC moved for submission of briefs. IAF, Tab 17. We DENY this motion. As the FDIC correctly notes, there is no provision in the Board's regulations for such briefs. *Id.* at 4; *see* 5 C.F.R. § 1201.93. Nor are we persuaded that, under the circumstances of this case, such briefs will shed light on the certified issues. The FDIC offers to show that the administrative judge deviated from traditional rules of statutory construction. IAF, Tab 17 at 4-5. However, the FDIC presented arguments concerning statutory construction below. *Id.*, Tab 10 at 12-13; *see Chandler v. Department of the Treasury*,

IAF, Tab 13. The appellant opposed. IAF, Tab 14 at 5. The administrative judge thereafter issued an order certifying her determinations for interlocutory appeal. IAF, Tab 16. We find that her certification was proper. *See* 5 C.F.R. §§ 1201.91-.92.

ANALYSIS

¶5 We agree with the administrative judge concerning her conclusions as to issues 1, 2, and 6 above. We hold that the Board has jurisdiction over the adverse employment action suffered by the appellant, including the penalty. We further hold that the FDIC was authorized to promulgate minimum standards of employment, but it was required to obtain OGE's concurrence, which it failed to do. We do not reach issues 3, 4, and 5. Instead, we decline to follow the regulations at issue because the FDIC exceeded its authority in promulgating them without meeting the statutory requirement of obtaining OGE's concurrence, and, therefore, the appellant's removal is reversed.

The Board has jurisdiction to review the appellant's removal for allegedly violating the FDIC's regulation concerning employee defalcation, including review of the penalty for such conduct.

¶6 The Board has jurisdiction to review the removal of the appellant, a full-time competitive-service employee, including review of whether the charged conduct occurred, the nexus between that conduct and the efficiency of the service, and the reasonableness of the penalty imposed by the FDIC, pursuant to 5 U.S.C. §§ 7511-7513. *See Gonzalez v. Department of Homeland Security*, 114 M.S.P.R. 318, ¶ 11 (2010) (stating those matters that an agency must prove by a preponderance of the evidence).

¶7 In 1978, Congress enacted the Civil Service Reform Act (CSRA) to replace the prior "patchwork system" of laws that had governed federal employment with

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120 M.S.P.R. 163, ¶ 3 n.1 (2013) (denying motions to submit interlocutory briefs in the interest of expediting the proceeding).

"an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *United States v. Fausto*, 484 U.S. 439, 445 (1988). The Board has jurisdiction under chapter 75 of the CSRA to review agency actions removing federal employees and to examine the reasons on which those actions are based. *Siegert v. Department of the Army*, 38 M.S.P.R. 684, 686 (1988); *see* 5 U.S.C. § 7513(d); *see also Elgin v. Department of the Treasury*, 132 S. Ct. 2126, 2130 (2012) (discussing both an employee's rights and the scope of Board review under the CSRA). As the Supreme Court has explained, "the CSRA makes [Board] jurisdiction over an appeal dependent only on the nature of the employee and the employment action at issue." *Elgin*, 132 S. Ct. at 2137 (citations omitted); *see Fausto*, 484 U.S. at 448-49 (holding that, given the "comprehensive nature" of the CSRA, the exclusion of certain employees from the protections of chapter 75 was deliberate). Here, neither party disputes that the appellant meets the definition of an employee for purposes of chapter 75 jurisdiction. *See* IAF, Tab 4 at 80 of 129, Tab 5 at 5, Tab 10 at 13. Instead, the FDIC argues that section 19 of the Resolution Trust Corporation Completion Act (RTCCA), Pub. L. No. 103-204, § 19, 107 Stat. 2369, 2402-04 (1993) (codified as amended at 12 U.S.C. § 1822(f)), limits the Board's authority under the CSRA by empowering the FDIC to "prescribe regulations establishing procedures for ensuring that any individual who is performing, directly or indirectly, any function or service on behalf of the Corporation meets minimum standards of competence, experience, integrity, and fitness," including prohibiting individuals who have engaged in a "pattern or practice of defalcation . . . from performing any service on behalf of the [FDIC]." IAF, Tab 10 at 6-7, 13-14; 12 U.S.C. § 1822(f)(4)(A), (E).

¶8 We cannot agree with the FDIC that the Board's jurisdiction is limited by section 19 of the RTCCA. There is nothing in the statute that suggests that Congress intended to circumscribe the reach of the CSRA. 12 U.S.C. § 1822(f).

In addition, the FDIC cites to no legislative history that supports its position, and we can locate none. *See* IAF, Tab 10 at 13-14 (failing to provide any such history); H.R. Rep. No. 103-103(I)-(II) (1993), *reprinted in* 1993 U.S.C.C.A.N. 3040, 3051, 3091-92 (discussing section 1822(f), identified as section 19 of the proposed legislation, without reference to the CSRA); H.R Rep. No. 103-380 (1993) (Conf. Rep.), *reprinted in* 1993 U.S.C.C.A.N. 3098, 3101 (same). We are mindful of the mandate that, when possible, statutes should be read to "foster harmony" with each other. *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 879 (1994) (citing, among other cases, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984) ("[W]here two statutes are 'capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'") (citation omitted)). Applying this principle, we read 12 U.S.C. § 1822(f) as empowering the FDIC to regulate the conduct of those providing services on its behalf, while still providing qualified employees with the full review of the Board for adverse employment actions under chapter 75 of the CSRA. We do not view these two principles as mutually exclusive.

¶9 In this regard, we decline to follow the regulations at 12 C.F.R. Part 336, Subpart B to the extent that they mandate the appellant's removal and limit Board review of that removal. Instead, we agree with the administrative judge's conclusion regarding issue 6, that the Board has jurisdiction over the adverse action and the penalty.[2] IAF, Tab 16 at 2.

[2] We do not reach issue 5, concerning whether the appellant would not necessarily be subject to mandatory removal for violation of the FDIC's minimum standards of fitness regulations because, as discussed below, we reverse the removal in its entirety.

The FDIC was authorized by Congress to promulgate the employment standards at 12 C.F.R. Part 336, Subpart B, but failed to obtain the required concurrence from the Office of Government Ethics.

¶10 The FDIC has the authority to issue ethics and conflict of interest rules and regulations for its employees only with OGE's concurrence. The FDIC implicitly concedes that such concurrence was not obtained, arguing instead that OGE agreed with the FDIC that the regulations at 12 C.F.R. Part 336, Subpart B are "minimum fitness regulations" for which no concurrence was required. IAF, Tab 10 at 7-9. At issue here are two separate provisions of the RTCCA concerning the promulgation of conduct regulations. 12 U.S.C. § 1822(f)(2), (f)(4). One provision, 12 U.S.C. § 1822(f)(2), with the heading "[r]egulations concerning employee conduct," empowers the FDIC's Board of Directors to "prescribe regulations" supplementing those of OGE, but "only with the concurrence of that Office."

¶11 Another provision, 12 U.S.C. § 1822(f)(4), with the heading "[d]isapproval of contractors" empowers the FDIC to "prescribe regulations establishing procedures for ensuring that any individual who is performing, directly or indirectly, any function or service on behalf of the Corporation meets minimum standards of competence, experience, integrity, and fitness." 12 U.S.C. § 1822(f)(4)(A). This latter provision provides that the procedures established under these regulations "shall prohibit any person who does not meet the minimum standards . . . from (i) entering into any contract with the Corporation; or (ii) becoming employed by the Corporation or otherwise performing any service for or on behalf of the Corporation." 12 U.S.C. § 1822(f)(4)(B).

¶12 We find that section 1822(f)(2), and not section 1822(f)(4), empowers the FDIC to prescribe regulations concerning *employee* conduct.[3] This conclusion is firmly grounded upon fundamental rules of statutory construction wherein we are to "give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed." *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883); *see Astoria Federal Savings & Loan Association v. Solimino*, 501 U.S. 104, 112 (1991) (statute should be construed "so as to avoid rendering superfluous" any of its language.) Additionally, a statute should be read as a whole and not "in a vacuum." 2A Norman J. Singer, Statutes and Statutory Construction § 46.05, at 154, 165 (6th ed. 2000). Here, Congress enacted two sections in the same statutory provision authorizing FDIC's promulgation of regulations, the exercise of which, in one instance, but not the other, requires OGE's concurrence. Ignoring this explicit statutory distinction between the FDIC's authority to regulate the ethical conduct of its employees and to establish minimum fitness requirements obviously renders it meaningless, a result that is fundamentally incompatible with the foregoing tenets of statutory construction. Rather, we read the plain language of the statute as unambiguously reflecting congressional intent that OGE concur in the FDIC regulations governing the

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[3] We are not persuaded by the FDIC's argument that the applicability of section 1822(f)(4) to employees was resolved in its favor in the case of *Asquino v. Federal Deposit Insurance Corporation*, 196 B.R. 25, 27-28 (D. Md. 1996). In that case, the court was not presented with the issue of whether section 1822(f)(2) or section 1822(f)(4) applied to employees and thus adopted the position taken by the agency without further analysis. *Id.* In fact, in *Asquino*, the FDIC took the position that review of discipline of employees pursuant to section 1822(f)(4) would be in accordance with the CSRA, a position that appears to be contrary to the position taken in the current case. *Id.* at 26-27. An agency is not free, as the FDIC attempts to do here, to interpret its regulations in one manner at one time to suit its purposes, and then refashion that interpretation at another time to suit some other purpose. *Papa v. U.S. Postal Service*, 31 M.S.P.R. 512, 517-18 (1986).

ethical conduct of its employees. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).[4] This is reinforced by the fact that the RTCCA originally required OGE's concurrence for regulations concerning the "conflicts of interest, ethical responsibilities, and the use of confidential information" by independent contractors, but later removed the requirement. *Compare* RTCCA, Pub. L. No. 103-204, § 19, 107 Stat. 2369, 2403 (1993) (containing this requirement), *with* Office of Government Ethics Authorization Act of 1996, Pub. L. No. 104-179, § 4(b), 110 Stat. 1566, 1567 (removing this requirement); *see* Contractor Conflicts of Interest, 59 Fed. Reg. 32,661 (June 24, 1994) (reflecting that such approval was obtained for regulations concerning independent contractors). Conversely, the requirement for OGE approval for regulations enacted pursuant to section 1822(f)(2) concerning employee conduct was not removed and remains in effect. 12 U.S.C. § 1822(f)(2); *see* IAF, Tab 11 at 6-7 (appellant's argument on this point).

¶13 The FDIC cites *Brotherhood of Railroad Trainmen v. Baltimore & Ohio Railroad Co.*, 331 U.S. 519 (1947), for the principle that statutory section headings "do not alter the meaning of the accompanying text." IAF, Tab 10 at 7 n.12 (citing *Brotherhood of Railroad Trainmen*, 331 U.S. at 528-29). The Court went on to note, however, that headings may be used for interpretation when

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[4] Member Robbins argues in his dissenting opinion that the FDIC's interpretation of its regulations should be accorded controlling weight. *See* Dissenting Opinion of Member Mark A. Robbins, ¶ 7. However, the operative inquiry here is not the FDIC's interpretation of its regulations, but, rather, whether those regulations comport with the statute authorizing them. In this regard, we note that the issue of deference to an agency's view of its enabling statute is relevant only if the underlying statute is ambiguous or silent on the question. *Chevron*, 467 U.S. at 843. However, it is axiomatic that the first question in reviewing an agency's construction of a statute is "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter." *Id.* at 842-43. Here, we find that the statute expressly addresses the issue and is not ambiguous. Therefore, it is not necessary to reach the question of the reasonableness of the FDIC's interpretation of the statute or what weight, if any, to be given its interpretation of its regulations.

"they shed light on some ambiguous word or phrase." *Brotherhood of Railroad Trainmen*, 331 U.S. at 529; *see* Singer, 2A Statutes and Statutory Construction § 47:14, at 257-58 (where the statute was enacted with the headings, "the headings may serve as an aid" in determining "legislative intent"). Given the use in the RTCCA of two separate subheadings, one for employees and one for contractors, we believe that the headings shed light on the purpose of each subsection and are appropriately used to clarify their purposes. The headings and the legislative history thus make clear that OGE's approval was required for the regulations at 12 C.F.R. Part 336, Subpart B.

¶14 An agency may not promulgate regulations that exceed its delegated authority. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988) (citations omitted); *see Anderson v. Department of Transportation*, 15 M.S.P.R. 157, 166 (1983) (noting that broad discretion is vested in management to establish appropriate discipline for employee misconduct subject to required statutory and regulatory procedures), *aff'd*, 735 F.2d 537 (Fed. Cir. 1984). As discussed above, the regulations at 12 C.F.R. Part 336, Subpart B required OGE approval, which was not obtained. Therefore, the FDIC impermissibly exceeded the authority delegated to it in the RTCCA in promulgating these regulations without OGE approval, and we agree with the administrative judge's determinations as to issues 1 and 2. IAF, Tab 16 at 1.

¶15 The FDIC argues, alternatively, that it was authorized to promulgate the minimum fitness regulations pursuant to its independent rulemaking authority under 12 U.S.C. § 1819. IAF, Tab 4 at 82 of 129, Tab 10 at 7, Tab 12 at 4. Where a specific statute and a general statute conflict, the specific statute is controlling. *Edmond v. United States*, 520 U.S. 651, 657 (1997) (citing *Busic v. United States*, 446 U.S. 398, 406 (1980)); *Todd v. Merit Systems Protection Board*, 55 F.3d 1574, 1578 (1995). Section 1819 provides the FDIC with its general powers, including "[t]o prescribe . . . such rules and regulations as it may deem necessary to carry out" the laws it administers or enforces.

12 U.S.C. § 1819(a)(10). Significantly, the provision notes that such authority is limited to the extent that such regulatory power has been vested in another agency. *Id.* The more specific grant of authority under section 1822(f)(2) to promulgate regulations concerning employee conduct with OGE's concurrence conflicts with, and controls over, the FDIC's more general rulemaking authority under section 1819. *Id.* In addition, section 1819, by its very terms, anticipates that the FDIC's authority in some instances, as in 12 U.S.C. § 1822(f)(2), will be limited by the authority of other agencies. 12 U.S.C. § 1819(a)(10).

The Board declines to follow the FDIC's improperly promulgated regulations regarding employee minimum standards of fitness and therefore reverses the appellant's removal.

¶16 Because the FDIC did not obtain the required OGE concurrence for the regulations at issue, we decline to follow them. The FDIC argues, citing *Elgin*, 132 S. Ct. at 2139, that the Board is without authority to determine whether the FDIC's regulations at 12 C.F.R. Part 336, Subpart B are valid and enforceable. IAF, Tab 13 at 6-8. In *Elgin*, the Board declined to rule on the constitutionality of a statute. 132 S. Ct. at 2138-39 & n.9. *Elgin* does not stand for the principle that the Board lacks authority to review an agency's regulations within the context of an employment action that would otherwise fall within the Board's jurisdiction. In fact, the Board does have such authority. *Parrish v. Merit Systems Protection Board*, 485 F.3d 1359, 1363-64 (Fed. Cir. 2007) (holding that the Board should review whether a federally-owned institute complied with statutory requirements in adopting a personnel plan that eliminated Board review of its reduction-in-force actions); *May v. Office of Personnel Management*, 38 M.S.P.R. 534, 538 (1988) (holding that the Board has the authority to adjudicate a constitutional challenge to an agency's application of a statute). This is particularly true with regulations, such as those at issue here, which purport to limit Board review. The Board's jurisdiction is always before it, and the Board has the authority to determine its own jurisdiction. *Latham v. U.S. Postal*

Service, 117 M.S.P.R. 400, ¶ 19 (2012) (citing *Parrish*, 485 F.3d at 1363) ("The Board has the authority, indeed the obligation, to determine its own jurisdiction over a particular appeal."). An agency cannot through its own action confer or take away Board jurisdiction. *Siegert*, 38 M.S.P.R. at 691.

¶17 The Board will decline to follow a regulation that is inconsistent with its statutory obligation to hear appeals pursuant to 5 U.S.C. § 7701. *Latham*, 117 M.S.P.R. 400, ¶ 19 (noting that where there is an affirmative conflict between a statute and regulation, the Board will defer to the statute in making its jurisdictional determination); *Aguzie v. Office of Personnel Management*, 116 M.S.P.R. 64, ¶ 20 (2011) (finding Board jurisdiction over a removal for suitability reasons, notwithstanding agency regulations purporting to divest the Board of such jurisdiction). The FDIC's minimum standards of fitness regulations attempt to circumvent the jurisdiction of the Board by eliminating or limiting Board review over adverse actions taken for violation of the minimum standards of fitness for employment. 12 C.F.R. §§ 336.8, 336.9. Further, as discussed above, they were not promulgated with the required OGE concurrence and therefore exceed the authority granted to the FDIC by the RTCCA. An agency action may not be sustained by the Board if the employee shows that the decision was not in accordance with the law. 5 U.S.C. § 7701(c)(2)(C); *Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 682-83 (1991) (when an agency has no legal authority for taking an action, the action is "not in accordance with law" and must be reversed). Because the appellant's removal was based on invalidly promulgated regulations, it must be reversed as not in accordance with law. *See Cuellar v. U.S. Postal Service*, 8 M.S.P.R. 624 (1981).

Returning this appeal to the administrative judge is necessary for a determination regarding the appellant's claims of disability discrimination and prohibited personnel practices.

¶18 In his initial appeal, the appellant alleged that he was discriminated against as the caretaker of two disabled individuals and sought compensatory damages in

connection with this claim. IAF, Tab 1 at 4-6, 8. In this regard, he claims that he "was told that one of the decision makers at the agency stated that [he] was hiding behind [his] children." *Id.* at 8. The Board has not previously determined whether an individual may raise a claim of discrimination based on his or her association with an individual with a disability. However, the Equal Employment Opportunity Commission (EEOC) has recognized such claims. *See Simms v. England*, EEOC Appeal No. 01992195, 2002 WL 1057094, at *3-*4 (E.E.O.C. May 16, 2002) (noting further that an agency does not have a duty to provide reasonable accommodation to an employee so that he may care for a disabled individual). The Board generally defers to the EEOC on issues of substantive discrimination law unless the EEOC's decision rests on civil service law for its support or is so unreasonable that it amounts to a violation of civil service law. *Southerland v. Department of Defense*, 119 M.S.P.R. 566, ¶ 20 (2013). The EEOC's decision to permit such claims is based on its regulations implementing the Americans with Disabilities Act Amendments Act, codified at 42 U.S.C. § 12101, et seq. 29 C.F.R. § 1630.8 (prohibiting discrimination based on an individual's relationship or association with an individual with a known disability). The EEOC's decision to permit claims of discrimination based on association with a disabled individual is neither unreasonable nor does it rest on civil service law, and therefore we defer to the EEOC's determination to permit this type of claim.

¶19 On return to the regional office, the administrative judge should address the appellant's disability discrimination claim and also determine whether the appellant's prohibited personnel practices claims are still viable in light of the reversal of the appellant's removal. IAF, Tab 1 at 4, 9.

ORDER

¶20 Accordingly, we affirm the administrative judge's rulings on certified issues 1, 2, and 6. We do not reach the remaining three issues certified for interlocutory appeal. Instead, we REVERSE the appellant's removal, VACATE

the stay order, and RETURN this matter to the Northeastern Regional Office for further adjudication consistent with this interlocutory decision.

FOR THE BOARD:

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

DISSENTING OPINION OF MEMBER MARK A. ROBBINS

in

Paul D. Jonson v. Federal Deposit Insurance Corporation

MSPB Docket No. PH-0752-13-0236-I-1

¶1 While agreeing that the Board has jurisdiction in this matter, I respectfully dissent with the Opinion and Order of my colleagues in this interlocutory appeal addressing the removal of an employee of the Federal Deposit Insurance Corporation (FDIC) for defalcation of obligations in excess of $50,000 owed to FDIC-insured institutions, in violation of long-standing agency regulations.

¶2 The central issue here is whether the regulations under which the agency is attempting to remove the appellant require the prior approval of the U.S. Office of Government Ethics (OGE) before promulgation. The record establishes, and the agency concedes, such approval was not obtained. But the agency argues, and I believe, that OGE approval was not necessary. Further, the record establishes that OGE concurs with this opinion. In the spirit of the deference due an agency to interpret its own regulations (and in this case, two interested agencies interpreting the same regulations), the Board should reverse this specific interlocutory decision below.

¶3 The appellant was removed pursuant to 12 C.F.R. Part 336, Subpart B for failure to meet the minimum standards for employment with the FDIC.

¶4 In 1993, Congress enacted the Resolution Trust Corporation Completion Act, Pub. L. No. 103-204, 107 Stat. 2369 (1993), of which section 19 supplemented the Federal Deposit Insurance Act by adding subsection (f) to 12 U.S.C. § 1822. This section established two separate and distinct sets of regulations pertaining to FDIC employees. The first (permissive) set supplemented the basic standards of ethical conduct for FDIC employees

regarding conduct, financial disclosures, and post-employment activities.[1] As documented in the record, the FDIC and OGE collaborated as required by 5 C.F.R. § 2635.105 to create the regulations now found at 5 C.F.R. Part 3201.

¶5 The second (congressionally required) set of regulations, under which the appellant was removed,[2] require the FDIC to establish procedures to ensure that any individual who performs, directly or indirectly, any function or service on behalf of the FDIC to meet minimum standards of competence, experience, integrity, and fitness. 12 U.S.C. § 1822(f)(4)(A). This provision also includes prohibiting any person who has "demonstrated a pattern or practice of defalcation regarding obligations to insure[d] depository institutions" from performing any service on behalf of the FDIC. 12 U.S.C. § 1822(f)(4)(E)(iii). These regulations are found at 12 C.F.R. Part 336, Subpart B.[3] This set of regulations cross-references those found in Title 5 of the Code of Federal Regulations, likely because they both pertain to employee accountability. Unlike ethics regulations, the fitness-for-duty regulations are unencumbered by a statutory requirement to obtain OGE approval.

¶6 The record in this case does not indicate that OGE objected to this position. In fact, OGE later confirmed this position in a letter dated April 25, 2013, by Seth H. Jaffe, Chief of the OGE Ethics Law and Policy Branch, in an unrelated action involving an FDIC applicant. Initial Appeal File, Tab 10, Exhibit 1.[4]

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[1] 12 U.S.C. § 1822(f)(2).

[2] 12 U.S.C. § 1822(f)(4).

[3] While not advanced by the agency, given the specificity of the statutory prohibition against defalcation enacted by Congress, I question whether regulations are even necessary for its enforcement by the agency.

[4] To the extent there is any ambiguity as to the position of OGE as outlined in the April 25, 2013 letter, the matter should be returned to the administrative judge for additional findings.

¶7 I believe the FDIC's interpretation of its own regulations is entitled to controlling weight unless it is plainly erroneous or inconsistent with the regulation. *See, e.g., Ballard v. Commissioner of Internal Revenue*, 544 U.S. 40, 70 (2005) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)); *see also Cooper Technologies Co. v. Duda*, 536 F.3d 1330, 1337 (Fed. Cir. 2008) (because the Patent and Trademark Office is specifically charged with administering statutory provisions relating to "the conduct of proceedings in the Office," the court gave deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the agency's interpretations of those provisions). That the FDIC's interpretation of its regulations found at 12 C.F.R. Part 336, Subpart B is ***not*** plainly erroneous is further supported by both OGE's position, and the fact that the language of the regulations is all but a verbatim recitation of the language in the statute.

¶8 For these reasons, the Board should reverse this specific interlocutory decision below finding that OGE concurrence was not necessary for the promulgation of 12 C.F.R. Part 336, Subpart B, consider the remaining three issues certified for interlocutory appeal by the administrative judge, and return this appeal to the administrative judge for further adjudication of the issues.

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Mark A. Robbins
Member