

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

2010 MSPB 41

Docket No. DC-0752-09-0149-I-2

**David P. Gessert,
Appellant,**

v.

**Department of the Treasury,
Agency.**

February 23, 2010

David P. Gessert, Washington, D.C., pro se.

John F. Schorn, Washington, D.C., for the agency.

Kristie C. Bowers, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The agency has petitioned for review of an initial decision that reversed the appellant's demotion. For the reasons set forth below, we GRANT the petition for review, VACATE the initial decision, and DISMISS the appeal for lack of jurisdiction.

BACKGROUND

¶2 The relevant facts in this appeal are not in dispute. On September 4, 2005, the agency appointed the appellant to the position of Marketing Specialist, GS-

12, through the Presidential Management Fellows (PMF) program. Refiled Appeal File (RAF), Tab 7 at 23; [5 C.F.R. § 213.3102\(j\)\(1\)\(ii\)](#). The appellant was appointed to the excepted service for a period not to exceed 2 years. RAF, Tab 7 at 23. Upon completion of the internship, the appellant would either be terminated or noncompetitively converted to a career or career-conditional appointment. *Id.* Effective March 19, 2006, the agency promoted the appellant to the GS-13 level, the full performance level for his position. *Id.* at 24. Effective December 10, 2006, the agency reassigned the appellant from his Marketing Specialist position to a Business Analyst position at the GS-13 level, the full performance level for that position. *Id.* at 25. Effective September 4, 2007, upon completion of the 2-year internship, the agency converted the appellant to a career appointment in the Business Analyst position. *Id.* at 26. Simultaneously, the agency promoted the appellant to the GS-14 level. *Id.*

¶3 On June 12, 2008, the agency proposed the appellant's demotion from his GS-14 Business Analyst position to his prior position of Marketing Specialist, GS-13. *Id.* at 27-31. The basis for the proposed demotion was that the agency lacked the legal authority to noncompetitively promote the appellant to the GS-14 level. *Id.* at 27-29. After the appellant responded in writing to the proposed demotion, *id.* at 34-40, the agency rescinded its proposal on July 17, 2008, *id.* at 57.

¶4 On the same day that it rescinded its proposed demotion of the appellant, the agency proposed correcting the allegedly improper promotion. *Id.* at 58-61. The agency indicated that the appellant had been promoted to the GS-14 level due to an administrative error and without legal authority. *Id.* at 59-61. The appellant responded in writing to the proposed correction of his promotion. *Id.* at 62-70. On October 22, 2008, the agency issued a decision correcting the appellant's promotion and returning him to a GS-13 Business Analyst position. *Id.* at 101-07. That action was effective November 9, 2008. *Id.* at 105.

¶5 The appellant filed a Board appeal challenging the agency's action on December 7, 2008. Initial Appeal File (IAF), Tab 1. He requested a hearing. *Id.* at 3. He alleged that the agency committed harmful procedural error and that its action was not in accordance with law. *Id.* at 5. On February 20, 2009, the administrative judge dismissed the appeal without prejudice to afford the parties an opportunity to pursue a settlement. IAF, Tab 10. The initial decision dismissing the appeal indicated that it would be refiled automatically after 90 days. *Id.* at 2. The refiled appeal was docketed on May 21, 2009. RAF, Tab 2.

¶6 During the processing of the appeal, the appellant withdrew his hearing request and agreed to have the appeal decided on the written record. IAF, Tab 9 at 3. In an initial decision issued on August 11, 2009, the administrative judge reversed the agency's action. RAF, Tab 11. Initially, she found that the appellant had established a prima facie case of Board jurisdiction over his appeal concerning the cancellation of a promotion by establishing that (1) his promotion actually occurred; (2) he took some action indicating acceptance of the promotion; and (3) the promotion was not revoked before he actually performed in the position at issue. *Id.* at 4-5. She then found that the agency failed to establish that the promotion was contrary to law or regulation, and that the Board therefore had jurisdiction over the appeal. *Id.* at 5-7. Because the basis for the agency's action was that it lacked legal authority to promote the appellant noncompetitively, the administrative judge found that the action had to be reversed. *Id.* at 7-8.

¶7 The agency has filed a timely petition for review of the initial decision. Petition for Review (PFR) File, Tab 1. The agency argues that the administrative judge misinterpreted [5 C.F.R. § 335.103\(c\)\(3\)\(i\)](#), *id.* at 8-11, and that she failed to harmonize that provision with another regulatory provision, [5 C.F.R. § 362.204](#), *id.* at 11-12. The agency also argues that the administrative judge misinterpreted written guidance from the Office of Personnel Management

(OPM). *Id.* at 13-15. The appellant has responded in opposition to the petition for review. PFR File, Tab 3.

ANALYSIS

¶8 The Board has jurisdiction to review an appeal of a reduction in grade or pay. [5 U.S.C. § 7512](#). The general rule is that a reduction in an employee's rate of basic pay is appealable to the Board. *See* [5 U.S.C. §§ 7511\(a\)\(4\)](#), 7512(4), 7513(d). However, an exception to this rule is when an agency reduces an employee's basic pay “from a rate that is contrary to law or regulation.” [5 C.F.R. § 752.401\(b\)\(15\)](#). Such an action is not appealable to the Board. *Id.*; *see also* *Hall v. Department of the Navy*, [73 M.S.P.R. 251](#), 254 (1997); *Warren v. Department of Transportation*, [19 M.S.P.R. 560](#), 565 (1984).

¶9 When an agency contends that it reduced an employee's pay to correct what it believes was an error in setting pay, then the agency bears the burden of showing that it set the employee's pay at a rate contrary to law or regulation. *See* *Lomax v. Department of Defense*, [78 M.S.P.R. 553](#), 559-60 (1998). The Board has held that an employee should not be forced to prove that the agency did not make an error in setting his pay, since the agency is in a much better position to know why it originally set the employee's pay as it did and what later led it to conclude that it made an error. *Vega v. U.S. Postal Service*, [108 M.S.P.R. 221](#), ¶ 11 (2008).

¶10 In claiming that it lacked the authority to promote the appellant to the GS-14 level noncompetitively, the agency cited [5 C.F.R. § 362.204\(d\)\(1\)](#), which states, “A Fellow may be promoted up to the GS-13 level or its equivalent.” *Id.*; *see* RAF, Tab 7 at 59. The agency also cited OPM’s written guidance relating to the PMF program, which states in relevant part that Fellows cannot be promoted to a higher grade level than the career ladder of their position supports, and that promotions after completion of the fellowship are to be dependent upon a number

of factors, including the career ladder and full performance level of the employee's position. RAF, Tab 7 at 59-60.

¶11 The administrative judge found that, although OPM regulations generally require that promotions be made pursuant to a merit promotion program using competitive procedures, agencies have the discretion under [5 C.F.R. § 335.103\(c\)\(3\)\(i\)](#) to noncompetitively promote an employee appointed into the competitive service by noncompetitive conversion or noncompetitive appointment. RAF, Tab 11 at 5. She determined that the discretion granted under [5 C.F.R. § 335.103\(c\)\(3\)\(i\)](#) permitted the appellant's noncompetitive promotion to the GS-14 level, and that the promotion was therefore not contrary to law or regulation. RAF, Tab 11 at 5-8. The agency disputes the administrative judge's interpretation of [5 C.F.R. § 335.103\(c\)\(3\)\(i\)](#). That provision permits agencies to except from competitive procedures

[a] promotion without current competition of an employee who was appointed in the competitive [service] from a civil service register, by direct hire, by noncompetitive appointment or noncompetitive conversion, or under competitive promotion procedures for an assignment intended to prepare the employee for the position being filled (the intent must be made a matter of record and career ladders must be documented in the promotion plan).

Id. The agency argues that the regulation permits an agency to noncompetitively promote a competitive service employee appointed through any of the listed methods only if the employee was appointed into an assignment intended to prepare the employee for the position being filled. PFR File, Tab 1 at 8-9. The administrative judge found that the regulation permits noncompetitive promotion of any employee who was appointed to the competitive service by noncompetitive conversion or noncompetitive appointment. RAF, Tab 11 at 5. In effect, the administrative judge interpreted the condition "for an assignment intended to prepare the employee for the position being filled (the intent must be made a matter of record and career ladders must be documented in the promotion plan)"

contained in the regulation as applying only to employees appointed in the competitive service under competitive promotion procedures.

¶12 We agree with the agency’s interpretation of [5 C.F.R. § 335.103\(c\)\(3\)\(i\)](#). As the agency correctly notes, the administrative judge’s interpretation of that provision gives agencies broad authority to noncompetitively promote any employee who was appointed in the competitive service “from a civil service register, by direct hire, by noncompetitive appointment or [by] noncompetitive conversion.” *See* PFR File, Tab 1 at 9. Interpreted in that manner, [5 C.F.R. § 335.103\(c\)\(3\)\(i\)](#) would constitute a significant exception to the general requirement that promotions be subject to competitive procedures. We find that the better interpretation is the one proposed by the agency, which would grant agencies the discretion to noncompetitively promote an employee appointed in the competitive service through any of the listed methods “for an assignment intended to prepare the employee for the position being filled” Such a limited exception would permit employing agencies to noncompetitively promote a competitive service employee into a position for which the employee was being prepared while preserving the general rule that competitive procedures be used in promotions.

¶13 We also agree with the agency that its proposed interpretation of [5 C.F.R. § 335.103\(c\)\(3\)\(i\)](#) is consistent with OPM’s written guidance concerning the PMF program. That guidance states in relevant part,

Promotions on or after conversion to the competitive service are dependent upon the agency’s merit promotion plan, the position’s career ladder and full performance level, the employee’s time-in-grade, and his/her performance. While there is no presumption of promotion on or after conversion or appointment to a permanent position, Fellows who meet agency requirements for the next grade level may be non-competitively promoted within their career ladders at the successful completion of the Program.

OPM, Presidential Management Fellows Program Guide for Agencies 46 (2005). <https://www.pmf.opm.gov/Documents/GuideForAgencies.pdf>. Consistent with

that guidance, an agency could noncompetitively promote an employee upon completion of the PMF program, but only in accordance with established agency policies and procedures. However, an agency would not be authorized to noncompetitively promote an employee upon completion of the PMF program beyond the intent documented in the program.

We therefore conclude that the agency did not have the discretion under [5 C.F.R. § 335.103\(c\)\(3\)\(i\)](#), or any other law or regulation, to noncompetitively promote the appellant to the GS-14 level. Accordingly, we find that the appellant's promotion was an error contrary to law or regulation and that the Board lacks jurisdiction over the agency's action correcting that error. *Hall*, 73 M.S.P.R. at 254; *see* [5 C.F.R. § 752.401\(b\)\(15\)](#).

ORDER

¶14 This is the final decision of the Merit Systems Protection Board in this appeal. 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 your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. 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 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.