

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

2011 MSPB 2

Docket No. CB-1205-10-0010-U-1

**Gary N. Lynch,
Petitioner,**

v.

**Office of Personnel Management,
Agency.**

January 5, 2011

Gary N. Lynch, Goldsboro, North Carolina, pro se.

Antonio A. San Martin, Jr., Washington, D.C., for the agency.

BEFORE

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

OPINION AND ORDER

¶1 This case is before the Board on a request for regulation review, filed pursuant to [5 U.S.C. § 1204](#)(f)(1)(B), of the Office of Personnel Management’s (OPM) regulation at [5 C.F.R. § 211.102](#)(c). For the reasons set forth below, we DENY the petitioner’s request.

BACKGROUND

¶2 The petitioner identifies [5 C.F.R. § 211.102](#)(c) – OPM’s regulatory definition of “preference eligible” – as the regulation he seeks to have reviewed.

Regulation Review Request File (RF), Tab 1 at 1. Section § 211.102(c) provides in pertinent part:

Preference eligible means veterans, spouses, widows, or mothers who meet the definition of “preference eligible” in [5 U.S.C. 2108](#). Preference eligibles are entitled to have 5 or 10 points added to their earned score on a civil service examination (see [5 U.S.C. 3309](#)). They are also accorded a higher retention standing in the event of a reduction in force (see 5 U.S.C. 3502). Preference does not apply, however, to inservice placement actions such as promotions.

[5 C.F.R. § 211.102\(c\)](#) (emphasis in original).

¶3 In 2008, the Department of Defense considered, but did not select, Mr. Lynch for two different merit promotions. Subsequent to each non-selection, he filed a Merit Systems Protection Board (MSPB) appeal alleging the agency had violated the Veterans Employment Opportunities Act of 1998 (VEOA). In each appeal, the administrative judge found no violation and the full Board denied Mr. Lynch’s petition for review. Mr. Lynch further appealed one of his cases to the U.S. Court of Appeals for the Federal Circuit, which affirmed the Board’s decision. *See Lynch v. Department of Defense*, MSPB Docket No. DC-3330-08-0789-I-1 (Initial Decision, Jan. 9, 2009) (pertaining to June 2008 application for promotion), *review denied*, [111 M.S.P.R. 311](#) (Table) (2009), *aff’d*, 347 F. App’x 583 (nonpublished decision) (Fed. Cir. 2009); *Lynch v. Department of Defense*, MSPB Docket No. DC-3330-09-0200-I-1 (Initial Decision, Apr. 9, 2009) (November 2008 application), *review denied*, [112 M.S.P.R. 302](#) (Table) (2009).

¶4 One of the MSPB’s initial decisions cited the challenged regulation in its analysis: “It is well settled that an employee is not entitled to veteran’s preference in intra-agency transfers or the merit promotion process. [5 C.F.R. §§ 335.103\(b\); 211.102\(c\)](#).” MSPB Docket No. DC-3330-08-0789-I-1, ¶ 5, *review denied*, [111 M.S.P.R. 311](#) (pertaining to June 2008 application). Subsequently on appeal to the Federal Circuit, the Court agreed with the Board:

Veterans' point preferences do not apply in the merit promotion process, which instead gives veterans the "opportunity to compete" for vacancies that are otherwise open only to current agency employees. *See* [5 U.S.C. § 3304\(f\)\(1\)](#) ("[Under the VEOA, 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."); *see also Joseph*, 505 F.3d at 1382.

347 F. App'x at 585.¹

¶5 In the petitioner's regulation review request, he argues that [5 C.F.R. § 211.102\(c\)](#) requires agencies to commit the prohibited personnel practices found at [5 U.S.C. §§ 2302\(b\)\(1\)\(D\) & 2302\(b\)\(11\)\(B\)](#).² RF, Tab 1 at 7 & 8. Section 2302(b)(1)(D) makes it a prohibited personnel practice to "discriminate for or against any employee or applicant for employment, on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 ([29 U.S.C. 791](#))." Section 2302(b)(11)(B) makes it a prohibited personnel practice to "knowingly fail to take, recommend, or approve any personnel action if the failure to take such action would violate a veterans' preference requirement."

¹ In *Joseph v. Federal Trade Commission*, [505 F.3d 1380](#), 1381-82 (Fed. Cir. 2007), the Federal Circuit agreed with the Board's interpretation of an internal promotion to be different from a "competitive examination." The Federal Circuit found that Joseph, a preference eligible, was given a full "opportunity to compete" in the merit selection process because the agency found him qualified, interviewed him, and considered him for the merit promotion. *Id.* at 1383-84. In the underlying Board decision, the Board found that OPM reasonably interpreted section 3304(f)(1) as "merely conferring on preference eligibles and certain other veterans the right to be considered alongside internal candidates under merit promotion procedures," rather than requiring an agency to conduct a competitive examination and apply veterans' preference. [103 M.S.P.R. 684](#), ¶ 10 (2006).

² The petitioner specifically cites [5 U.S.C. § 2301\(b\)\(11\)\(B\)](#), which does not exist. We interpret the petitioner's brief to intend to cite 5 U.S.C. § 2302(b)(11)(B), which discusses veterans' preferences.

ANALYSIS

¶6 Under [5 U.S.C. § 1204](#)(f), the Board has the discretionary authority to review rules and regulations issued by OPM. The Board will declare a 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 section 2302(b).” [5 U.S.C. § 1204](#)(f)(2)(A). The Board’s regulations, at [5 C.F.R. § 1203.11](#)(b)(1)(iii)-(iv), also clearly state that the individual requesting review must specifically describe how the regulation would require an employee to commit a prohibited personnel practice in enforcing the regulation, and must specifically identify the prohibited personnel practice in [5 U.S.C. § 2302](#)(b) that would be violated by the regulation or its implementation. See *Alver v. Office of Personnel Management*, [68 M.S.P.R. 174](#), 175 (1995). The Board will then, in its discretion, grant review depending on its consideration of a number of factors, including: (1) the likelihood that the issue will be timely reached through ordinary channels of appeal; (2) the availability of other equivalent remedies; (3) the extent of the rule or regulation’s application; and (4) the strength of the arguments against its validity. *Johnson v. Office of Personnel Management*, [93 M.S.P.R. 265](#), ¶ 4 (2003). For the reasons discussed below, we decline to exercise our discretion to review OPM’s regulation at 5 C.F.R. § 211.102(c).

The petitioner fails to explain in sufficient detail how OPM’s regulation at [5 C.F.R. § 211.102](#)(c) would require an agency to violate [5 U.S.C. § 2302](#)(b)(1)(D).

¶7 Regarding the prohibited personnel practice at [5 U.S.C. § 2302](#)(b)(1)(D), disability discrimination, the petitioner fails to explain in sufficient detail how [5 C.F.R. § 211.102](#)(c) requires agencies to commit the prohibited personnel practice. The petitioner argues that “most, if not all preference eligible veterans, have a ‘handicapping condition,’ which places the veteran in the personnel category covered under” [5 U.S.C. § 2302](#)(b)(1)(D). RF, Tab 1 at 8. Essentially, he argues that [5 C.F.R. § 211.102](#)(c) requires agencies to usually, if not always,

commit disability discrimination against preference eligible veterans and thus violate [5 U.S.C. § 2302\(b\)\(1\)\(D\)](#). However, as a threshold matter, the petitioner fails to explain in sufficient detail, or support with any indicia of evidence, his claim that “most, if not all,” preference eligible veterans satisfy the statutory requirements of a “handicapping condition” as defined under the laws and regulations pertinent to the Rehabilitation Act.³ To the extent the petitioner is alleging that the regulation requires agencies to violate veterans’ preference laws, his citation to section 2302(b)(1)(D) is duplicative of his main argument that [5 C.F.R. § 211.102\(c\)](#) violates veterans’ preference laws and section 2302(b)(11)(B). Therefore, because the petitioner has failed to specifically describe in sufficient detail how 5 C.F.R. § 211.102(c) requires an agency to violate 5 U.S.C. § 2302(b)(1)(D), we decline to exercise our discretion to review OPM’s regulation.

The petitioner’s claim that OPM’s regulation requires an agency to violate 5 C.F.R. § 2302(b)(11)(B) can be reached through ordinary appeal channels.

¶8 The regulation now challenged by the petitioner was clearly at issue in his prior litigation. The petitioner contested the agency’s non-selection of him for positions in two appeals filed with the MSPB under VEOA. At issue was whether the agency had properly denied veterans’ preferences to Mr. Lynch, who was already an agency employee, when he applied for two merit promotions, and was considered for both promotions, but was not selected. In one of the petitioner’s two appeals in which the Board denied corrective action to the petitioner, the Board affirmed the validity of [5 C.F.R. § 211.102\(c\)](#). See *Lynch v. Department of*

³ This lack of explanation is particularly problematic given the complexities of disability discrimination law. As observed by the Equal Employment Opportunity Commission, the federal agency with enforcement authority for the Rehabilitation Act, “[t]he finding of disability pursuant to other statutes may differ from the definition of disability under the Rehabilitation Act and is not necessarily dispositive[.]” *Jimenez v. Department of Treasury*, EEOC Appeal No. 07A30102, 2004 WL 3070682, at *3 n.2 (E.E.O.C. Dec. 22, 2004).

Defense, MSPB Docket No. DC-3330-08-0789-I-1, ¶ 5. The petitioner then appealed the Board's decision to the Federal Circuit, and the Federal Circuit affirmed the Board's conclusion. 347 F. App'x at 585.

¶9 Although the petitioner identifies numerous statutes under Title 5 that he claims are violated by implementation of [5 C.F.R. § 211.102\(c\)](#), he comments specifically on only one of these statutes, [5 U.S.C. § 3304\(f\)\(1\)](#). *Id.* at 1, 5. He maintains that the regulation is "illogical and contradictory to" section 3304(f)(1) because, he argues, section 3304(f)(1) "mandates by law, that preference be accorded even to an employee." *Id.* He further argues that OPM's regulation offers "lesser protections guaranteed under the Statutes to employees who are preference eligible than to initial hires with the same preference status." *Id.* at 3. In short, he challenges the Board and Federal Circuit's interpretation of section 3304(f)(1) in its decisions in *Joseph*.

¶10 Here, there is not merely a "likelihood" that the issue will be timely reached through ordinary channels of appeal; instead, the issue *has been reached* by the Board and the petitioner appealed that case to the Federal Circuit. *See National Treasury Employees Union v. Office of Personnel Management*, [110 M.S.P.R. 237](#), ¶¶ 8-9 (2008) (denying regulation review where issue was addressed by an arbitrator and was on appeal before another agency), *Kirkendall v. Office of Personnel Management*, [97 M.S.P.R. 86](#), 90 (2004) (denying regulation review – "[r]egardless of the outcome" – where ordinary appellate channels were available for petitioner's concerns). To the extent that the petitioner raises claims in this proceeding that are distinguishable from his claims made in his earlier appeals, the claims raised now could have been raised in his earlier appeals. *Id.* In addition, the remedies available to a successful appellant in such a proceeding are broad. These facts militate against conducting a regulation review.

¶11 Under these circumstances, we decline to exercise our authority to review the regulation at [5 C.F.R. § 211.102\(c\)](#) as requiring a violation of [5 U.S.C. § 2302\(b\)\(11\)](#) and the petitioner's request is denied.⁴

¶12 As OPM correctly notes, this denial of Mr. Lynch's request for regulation review does not bar him from challenging the regulation in the context of a future case or controversy involving a merit promotion action. Nonetheless, as OPM also notes, in order to prevail on such a claim, Mr. Lynch would need to persuade the Federal Circuit to overrule its decision in *Joseph*, [505 F.3d 1380](#).

ORDER

¶13 For the reasons set forth above, we DENY the request for regulation review. This is the final decision of the Merit Systems Protection Board in this matter. Title 5 of the Code of Federal Regulations, section 1203.12(b) ([5 C.F.R. § 1203.12\(b\)](#)).

NOTICE TO THE PETITIONER 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

⁴ The Board has previously held that where the issue of a regulation's validity can or will reach the Board through the ordinary channels of appellate jurisdiction, the validity of regulations will not be reviewed under the Board's extraordinary, but limited jurisdiction to review the validity of regulations. *National Council of Field Assessment Locals v. Department of Health & Human Services*, [31 M.S.P.R. 590](#), 591 (1986); *In re Furloughs of Career Appointees in the Senior Executive Service (5 C.F.R. Part 359, Subpart H)*, [13 M.S.P.R. 235](#) (1982).

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.