

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

2012 MSPB 119

Docket No. CB-1205-11-0012-U-1

**Christopher Joseph Roesel,
Petitioner,**

v.

**Office of Personnel Management,
Agency.**

October 26, 2012

Christopher Joseph Roesel, Covington, Georgia, pro se.

Robert J. Girouard, Esquire, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The petitioner requests the Board to exercise its authority under [5 U.S.C. § 1204](#)(f) to review a regulation of the Office of Personnel Management (OPM). For the reasons set forth below, we DENY the petitioner's request for a regulation review.

BACKGROUND

¶2 The petitioner filed an appeal challenging the failure of the Agency for International Development to issue a timely decision on his eligibility for a security clearance. *Roesel v. Agency for International Development*, Docket No.

AT-3443-10-0889-I-1, Initial Appeal File, Tab 1. The petitioner cited the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Title III, Section 3001(g), providing that "[d]eterminations on clearances not made within 60 days shall be made without delay," and asserted that his investigation had lasted more than 132 days. *Id.*, Tab 1 at 5-6. The petitioner contended that the Board's authority to review regulations of OPM applied to his claim because OPM is the lead agency on security clearances. *Id.*, Tab 4 at 3. He also alleged that OPM has implicitly applied section 3001(g) to regulate security clearance investigations in its manual, "End-to-End-Hiring Initiative," at page 43. *Id.*

¶3 On August 18, 2010, the administrative judge dismissed the appeal for lack of appellate jurisdiction over the petitioner's claim, noting that review of OPM regulations was a matter within the Board's original jurisdiction. *Id.*, Tab 5. As a result, the administrative judge informed the petitioner that a "request for review of OPM regulations must be filed with the Office of the Clerk of the Board." *Id.*, Tab 5 at 2. The petitioner then filed a petition for review of the administrative judge's initial decision, stating that he had been informed he should file a petition for review of OPM regulations. The Board denied the petition for review, affirmed the initial decision, and directed the Clerk of the Board to docket the petitioner's petition as a request for review of an OPM regulation. *Roesel v. Agency for International Development*, Docket No. AT-3443-10-0889-I-1, Final Order (April 5, 2011).

¶4 On April 8, 2011, the Clerk issued an Acknowledgement Letter docketing this case as a request for regulation review and stating that the record in the petitioner's appeal would be entered into the record of this case. Regulation Review File (RRF), Tab 2. The Letter notified the petitioner of his opportunity to file an additional submission in support of his request for regulation review, and it provided him a copy of [5 C.F.R. § 1203.11](#), the regulation which sets forth the contents required to be part of such a request. *Id.* The Letter also notified OPM of its opportunity to submit a response to the petitioner's request. *Id.*

¶5 In its response, OPM noted that the sentence on page 43 of its manual that is cited by the petitioner provides:

Maximum number of days for Clearance Adjudication - 90% within 30 days of (FY08), 90% within 20 days (FY09 and beyond); Maximum number of days for suitability determination-only has not been stipulated but may be defined as reform initiatives align security and suitability processes.

RRF, Tab 4 at 5. OPM noted that the provision of IRTPA relied on by the petitioner, codified at [50 U.S.C. § 435b\(g\)](#), provides that an adjudicative agency's plan for evaluating applications for security clearances must require, to the extent practicable, that at least 90 percent of all applications will be adjudicated within 60 days from the investigative agency's receipt of the completed application. *Id.* at 5-6. The plan must also provide that determinations on clearances taking longer than 60 days "shall be made without delay." *Id.* OPM contended that the Board should dismiss the petitioner's request because the OPM guidance that the petitioner cites is not a rule or regulation and because he has not identified any prohibited personnel practice that OPM's issuance would require or has required. *Id.* at 6-9.

¶6 The petitioner responded that his security investigation had already taken 447 days without his receiving a decision. RRF, Tab 6 at 3. He contended that IRTPA in section 3001(b)(2) requires OPM to develop policies and procedures to ensure timely security clearance determinations and that OPM's failure to provide time limits for the 10% of clearances not completed within 60 days violates the clear intentions of the law. *Id.*

ANALYSIS

¶7 The Board has original jurisdiction under [5 U.S.C. § 1204\(f\)\(1\)](#) to review rules and regulations promulgated by OPM. In reviewing the regulation, the Board may declare the regulation 1) invalid on its face if its implementation would require an employee to commit a prohibited personnel practice in violation of [5 U.S.C. § 2302\(b\)](#) or 2) invalidly implemented if its implementation by an

agency has required an employee to violate section 2302(b). [5 U.S.C. § 1204\(f\)\(2\)\(A\), \(B\)](#); *Thoms v. Office of Personnel Management*, [103 M.S.P.R. 652](#), ¶ 3 (2006). The Board's regulations at [5 C.F.R. §§ 1203.11\(b\)\(1\)\(ii\)](#) and (iii) require an individual requesting a regulation review to identify the OPM regulation being challenged and the reasons why implementation of the regulation requires commission of a prohibited personnel practice. *Kligman v. Office of Personnel Management*, [103 M.S.P.R. 614](#), ¶ 5 (2006). The Board's regulations also require the individual to identify the prohibited personnel practice at issue. *Id.*; [5 C.F.R. § 1203.11\(b\)\(1\)\(iv\)](#).

¶8 The petitioner's challenge is based on language in an OPM manual, "End-To-End Hiring Initiative," that provides guidance to assist agency officials in carrying out their hiring responsibilities. The hiring manual does not appear to be a rule or regulation within the meaning of section 1204(f) since its provisions do not directly implement and interpret statutory provisions. *Cf. Kligman*, [103 M.S.P.R. 614](#), ¶ 14 (Delegated Examining Operations Handbook found not to be a rule for purposes of section 1204(f)). In any event, the petitioner does not challenge the language on page 43 of the manual that he cites.* Instead, he challenges OPM's failure to promulgate a regulation giving specific content to the statutory language requiring clearance investigations taking more than 60 days to be completed "without delay." RRF, Tab 6. However, there is nothing in [5 U.S.C. § 1204\(f\)](#) that gives the Board authority to require OPM to issue a rule or regulation to implement a statute.

¶9 In addition, the petitioner has not identified a specific prohibited personnel practice or provided any reason to believe that OPM's manual would require an employee to commit such a violation of section 2302(b). The Board's jurisdiction

* A challenge to this language restating the standard set out in [50 U.S.C. § 435b\(g\)\(2\)\(A\)](#) would not be within the Board's section 1204(f) jurisdiction, which does not extend to review of a regulation to the extent it merely incorporates statutory language. *See Thoms*, [103 M.S.P.R. 652](#), ¶ 5.

under [5 U.S.C. § 1204](#)(f) does not give it authority to entertain all objections to the legality or the wisdom of OPM's regulations. Rather, the Board's authority under the statute is limited to its role in protecting the merit system from enumerated prohibited personnel practices. *See National Treasury Employees Union v. Office of Personnel Management*, [76 M.S.P.R. 244](#), 255 (1997) (the Board's jurisdiction under section 1204(f) does not extend to challenges to OPM regulations that could be made on grounds other than those specified in section 1204(f)).

ORDER

¶10 Accordingly, the Board denies the petitioner's request for a regulation review. This is the final decision of the Merit Systems Protection Board in this proceeding.

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.