

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

94 M.S.P.R. 212

DOUGLAS L. AVERY,
Petitioner,

DOCKET NUMBER
CB-1205-02-0023-U-1

v.

OFFICE OF PERSONNEL
MANAGEMENT

DATE: September 11, 2003

AND

GENERAL SERVICES
ADMINISTRATION,
Respondents.

Douglas L. Avery, Fort Washington, Maryland, pro se.

Eric S. Gold, Washington, D.C., for the Office of Personnel Management.

F. Allen Phaup, II, Washington, D.C., for the General Services
Administration.

BEFORE

Susanne T. Marshall, Chairman
Neil A. G. McPhie, Member

OPINION AND ORDER

¶1 This matter is before the Board pursuant to the petitioner's May 7, 2002, submission to the Clerk of the Board titled "Petition for Regulation Review." For the reasons set forth below, we DENY the petitioner's request.

BACKGROUND

¶2 The petitioner, a nonveteran, is employed by the General Services Administration (GSA) as a GS-12 Security Specialist with the Federal Protective Service. Request File (RF), Tab 1 at 2. He applied for a GS-13 Security Manager position under a competitive process, but his name was not included on the certificate forwarded to the selecting official.¹ *Id.* Thereafter, he learned that the names of three veterans were forwarded to the selecting official and that two of them were awarded ten additional points in the ranking because of veterans' preference. *Id.* at 3. According to the petitioner, as a result of the additional points, the two individuals placed ahead of him in the ranking *Id.*

¶3 In his initial and supplemental filings with the Board, the petitioner contends that veterans are not entitled to a preference, such as the addition of points to a score, when seeking promotion or "intra-agency movement" and that GSA's policy of affording a preference forces human resource employees to routinely commit prohibited personnel practices in violation of 5 U.S.C. § 2302(b)(6). RF, Tabs 1, 9, 12. That statutory provision precludes the granting of "any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment." 5 U.S.C. § 2302(b)(6). The petitioner also asserts that GSA has misinterpreted 5 C.F.R. § 211.102(c), regarding who meets the definition of a preference eligible and is therefore entitled to a preference.² RF, Tab 12.

¹ The Office of Personnel Management (OPM) acknowledges that most of the pertinent facts in this matter are not in dispute. RF, Tab 7 at 3.

² The petitioner also alleges that OPM has failed to meet its civil service oversight responsibility by allowing GSA to improperly award veterans' preference. RF, Tabs 10, 11. He also requests a stay of the hiring process for the Security Manager position pending a hearing and seeks an order directing the agency to compile a new certificate consistent with veterans' preference laws. *Id.*, Tab 1 at 6. Finally, he seeks an order

ANALYSIS

¶4 The Board has original jurisdiction to review rules and regulations issued by OPM and to declare such provisions invalid on their face or invalidly implemented by any agency.³ 5 U.S.C. § 1204(f); *Prewitt v. Merit Systems Protection Board*, 133 F.3d 885, 886-87 (Fed. Cir. 1998); *Morales v. Office of Personnel Management*, 90 M.S.P.R. 631, ¶ 5 (2001). In exercising its jurisdiction, the Board is authorized to declare OPM rules and regulations invalid if it determines that their implementation would require an employee to commit prohibited personnel practices, as defined in 5 U.S.C. § 2302(b). *Prewitt*, 133 F.3d at 887; *Morales*, 90 M.S.P.R. 631, ¶ 5; see *Weir v. Office of Personnel Management*, 62 M.S.P.R. 91, 93 (1994).

¶5 The essence of the petitioner's claim is that a prohibited personnel practice in violation of 5 U.S.C. § 2302(b)(6) is committed where a purportedly unauthorized preference improves the prospects of veterans as a class at the expense of nonveterans as a class. The Board has not viewed the language of section 2302(b)(6) so broadly; rather, the Board interprets section 2302(b)(6) to cover situations where the prospects of a specific person are injured or improved by an unauthorized preference. *Weir v. Office of Personnel Management*, 62 M.S.P.R. at 94; see *Office of Special Counsel v. Byrd*, 59 M.S.P.R. 561, 570 (1993), *aff'd sub nom. Byrd v. Merit Systems Protection Board*, 39 F.3d 1196 (Fed. Cir. 1994) (*Table*). This is consistent with the language of the statute

directing the agency to identify and notify individuals injured by the agency's purported prohibited personnel practice during the past ten years *Id.* In light of our finding in this matter, we need not address these claims.

³ The essential distinction between facial invalidity and invalid implementation is that the former relates to prospective application of regulations, whereas the latter relates to implementation which has already taken place in some particular agency resulting in commission of a prohibited personnel practice at that agency. *Morales*, 90 M.S.P.R. at 632 n.1; *Wells v. Harris*, 1 M.S.P.R. 208, 245-46 (1979, *modified on other grounds by Gende v. Department of Justice*, 23 M.S.P.R. 604 (1984)).

which, as indicated above, addresses the improper granting of any preference for “the purpose of improving or injuring the prospects of any particular person for employment.” 5 U.S.C. § 2302(b)(6) (emphasis supplied); *see Weir*, 62 M.S.P.R. at 94.

¶6 The petitioner does not allege that GSA’s policy results in the unauthorized awarding of a preference for the purpose of helping or harming the employment prospects of any specific individual. Extra points were granted to all preference eligible candidates and the petitioner acknowledges that the granting of such a preference has been GSA policy for years. RF, Tab 1 at 3. Thus, even if GSA’s practice of granting a preference to veterans seeking promotion was contrary to statute, it does not constitute a prohibited personnel practice. *See Weir*, 62 M.S.P.R. at 94. Accordingly, the Board has no authority to invalidate the practice. *Id.* The petition for a regulation review is DENIED.

ORDER

¶7 This is the final decision of the Merit Systems Protection Board in this regulation review request.

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

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 web site, <http://www.mspb.gov>.

FOR THE BOARD:

Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.