UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2008 MSPB 146

Docket Nos. AT-3443-05-0550-R-1
AT-0330-05-0409-R-1

Robert P. Isabella,

Appellant,

v.

Department of State,

Agency,

and

Office of Personnel Management,

Petitioner.

July 2, 2008

Mathew B. Tully, Esq., Tully, Rinckey & Associates, Albany, NY, for the appellant.

Paul S. Veidenheimer, Washington, D.C., for the agency.

Kerry B. McTigue, Esq., Steven E. Abow, Esq., Earl A. Sanders, Esq., and Becky C. Ronayne, Esq., Washington, D.C., for the petitioner.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 Pursuant to 5 U.S.C. § 7703(d), the Director of the Office of Personnel Management (OPM) requests that the Board reconsider its final decision in this case, *Isabella v. Department of State*, 106 M.S.P.R. 333 (2007). For the reasons

set forth below, we DENY the Director's petition for reconsideration and AFFIRM the final decision.

BACKGROUND

¶2 In June 2004, the appellant, a preference eligible veteran who was then 36 years of age, applied for the excepted service position of Diplomatic Security Service Special Agent with the agency. The vacancy announcement provided that "Special Agent Candidates must be appointed prior to their 37th birthday." Several months later, the agency eliminated the appellant from the selection process based on the fact that he would soon reach age 37.

¶3 The appellant filed an appeal challenging his nonselection pursuant to the Veterans Employment Opportunities Act (VEOA) and the Uniformed Services Employment and Reemployment Rights Act (USERRA). The administrative judge initially dismissed the appeal for lack of jurisdiction after finding, inter alia, that the appellant had not made a nonfrivolous allegation that his rights as a preference eligible had been violated. *Isabella v. Department of State*, MSPB Docket No. AT-0330-05-0409-I-1 (Initial Decision, April 29, 2005). On review, the Board vacated the initial decision after determining that the appellant's rights may have been violated because, per 5 U.S.C. § 3312, he was entitled to waiver of the age requirement for the Special Agent position unless the requirement is essential to the performance of the duties of the position. The Board held that the appellant had made a nonfrivolous allegation that the agency violated his rights under a statute related to veterans' preference and therefore the Board has jurisdiction over his VEOA claim. *Isabella v. Department of State*, 102 M.S.P.R. 259, ¶ 13 (2006). The Board remanded for further proceedings to determine whether the age requirement was essential to the performance of the duties of the position. *Id*.

¶4 On remand, the administrative judge found that the congressional intent to secure a "young and vigorous" law enforcement workforce demonstrated that the

agency's age requirement was essential to the performance of the duties of the position. The administrative judge therefore denied the appellant's request for corrective action under VEOA. *Isabella v. Department of State*, MSPB Docket No. AT-0330-05-0409-B-1 (Initial Decision, Oct. 10, 2006).

¶5 On review, the Board reversed the initial decision and held that the agency violated the appellant's veterans' preference rights when it did not waive the age requirement for the Special Agent position. *Isabella*, 106 M.S.P.R. 333 (2007). The Board found that the purpose for setting a maximum entry age for a position with a mandatory retirement age is to enhance the retirement scheme by allowing individuals entering the position to enjoy a full career prior to reaching the mandatory retirement age. *Id*. at ¶ 42. The Board held that this purpose "is insufficient to establish that the maximum entry age is essential to the performance of the duties of the position." *Id*. at ¶ 43. The Board ordered the agency to waive the age limit and to process the appellant's application to completion. *Id*. at ¶ 48. In light of this relief, the Board determined that the appellant's USERRA claim was rendered moot. *Id*. at ¶¶ 45-47.[1]

¶6 The Director of OPM petitions for reconsideration of the final decision. Reconsideration File (RF), Tab 8. The appellant has responded in opposition to OPM's petition. RF, Tab 12.

ANALYSIS

¶7 The Director of OPM may file a petition for reconsideration of a final decision of the Board if the Director determines: 1) that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management; and 2) that the Board's decision will have a substantial impact on a

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[1] Chairman McPhie issued a separate opinion concurring in the result. *Isabella*, 106 M.S.P.R. at 365-66. He would have ruled for the appellant on the VEOA claim based on the agency's failure to make a timely determination as to whether the age requirement should be waived. *Id.* at 366. He also stated his view that the appellant did not meet his burden of proof under USERRA. *Id.* at 365.

civil service law, rule, regulation, or policy directive. *See* 5 U.S.C. § 7703(d); 5 C.F.R. § 1201.119(a). The Board will consider *de novo* the arguments raised by OPM on petition for reconsideration. *Griffin v. Office of Personnel Management*, 83 M.S.P.R. 67, 72 (1999).

¶8 Here, OPM asserts that the Board misconstrued the pertinent statutory provisions and erred in ordering the agency to waive the age limit for the position of Diplomatic Security Service Special Agent with respect to the appellant's application for the position. Specifically, OPM argues that: 1) the statutory authority to set maximum entry ages "takes precedence over" the waiver provision of the Veterans Preference Act, 5 U.S.C. § 3312; 2) the Board must defer to OPM's interpretation of the statutory provisions; and 3) the maximum entry age is essential to the performance of federal law enforcement officer and firefighter positions. Reconsideration File (RF), Tab 8. We address these points in turn.

¶9 The starting point for interpreting a statute is the language of the statute itself, which governs absent a clearly expressed legislative intent to the contrary. *See Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Here, the Veterans' Preference Act provides as follows:

> (a) In determining qualifications of a preference eligible for examination for, appointment in, or reinstatement in the competitive service, the Office of Personnel Management or other examining agency shall waive --
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> > (1) requirements as to age, height, and weight, unless the requirement is essential to the performance of the duties of the position....

5 U.S.C. § 3312(a)(1). *See also id*. at § 3363(1) (providing for waiver of age, height, and weight requirements in determining qualifications of a preference eligible for promotion in the competitive service). Section 3312 applies to the excepted service pursuant to 5 U.S.C. § 3320, which provides that selections to the excepted service must be made "in the same manner and under the same conditions required for the competitive service by sections 3308-3318 of this

title." Thus, pursuant to §§ 3312 and 3320, the agency was required to waive the age requirement for the Special Agent position for the appellant and other preference eligible applicants, unless the age requirement is "essential to the duties of the position."

¶10 The agency's authority to fix age limits is derived from 22 U.S.C. § 4823, which states that the qualifications for the Special Agent position "may include minimum and maximum entry age restrictions." Similar authority is granted to the heads of other executive agencies by 5 U.S.C. § 3307(d)-(e),[2] which applies to the competitive service. *See Isabella*, 106 M.S.P.R. 333 at ¶ 24. OPM contends that there is a conflict between the § 3312 waiver provision and 5 U.S.C. § 3307(d)-(e), and by extension, 22 U.S.C. § 4823. OPM, invoking various canons of construction, would resolve this purported conflict by rendering the waiver inapplicable to the age requirements authorized by these statutory provisions. The appellant responds that there is no evidence that Congress, in enacting § 3307, intended to override or repeal "a right that had been granted

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[2] Section 3307 provides:

> (a) Except as provided in subsections (b), (c), (d), (e) and (f) of this section, appropriated funds may not be used to pay an employee who establishes a maximum age requirement for entrance into the competitive service.
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> * * *
>
> (d) The head of any agency may determine and fix the minimum and maximum limits of age within which an original appointment may be made to a position as a law enforcement officer or firefighter, as defined by section 8331(20) and (21), respectively, of this title.
>
> (e) The head of any agency may determine and fix the maximum age limit for an original appointment to a position as a firefighter or law enforcement officer, as defined by section 8401(14) or (17), respectively, of this title.

5 U.S.C. § 3307.

decades earlier to the fighting men and women of this country." RF, Tab 12 at 9-10. The appellant argues that the provisions can be reconciled "by construing § 3307(d) and (e) to apply to all law enforcement officer positions except where the applicant is a preference eligible, in which case § 3307(d) and (e) are waived, unless the maximum age entry requirement is essential to the performance of the duties of the position for which application has been made." *Id*. at 5.

¶11 We agree with the appellant's statutory interpretation. It can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change. *United States v. Fausto*, 484 U.S. 439, 453 (1988). Indeed, the "cardinal rule" is that repeals by implication are not favored. *See, e.g.*, *Hagan v. Utah*, 510 U.S. 399, 416 (1994); *Posadas v. National City Bank of New York*, 296 U.S. 497, 503 (1936); *Templeton v. Office of Personnel Management*, 951 F.2d 338, 340 (Fed. Cir. 1991); *Kent v. General Services Administration*, 56 M.S.P.R. 536, 546 n.14 (1993). The Supreme Court has described repeals by implication as falling into two categories: 1) where provisions in two statutes are in irreconcilable conflict, the later statute to the extent of the conflict constitutes an implied repeal of the earlier one; and 2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. *Posadas*, 296 U.S. at 503. In either case, the intent of the legislature to repeal must be clear and manifest. *Id*. Here, however, neither the language of § 3307 nor the extensive legislative history cited by OPM, *see* RF, Tab 8 at 8-12, provides any evidence of a clear and manifest congressional intent to override § 3312.

¶12 The Supreme Court has instructed that when courts are confronted with statutes capable of coexistence, it is the duty of courts to regard each as effective. *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Here, sections 3307 and 3312 are easily reconciled on the plain language. If an applicant's age exceeds an age limit authorized by § 3307(d) or (e), then the hiring authority must determine whether the applicant is preference eligible. If the answer is no, then a maximum

entry age fixed pursuant to 5 U.S.C. § 3307(d) or (e) bars the non-preference eligible candidate from having his application processed. On the other hand, if the applicant is preference eligible, then the hiring authority must make an additional determination: Is the age limit "essential to the performance of the duties of the position?" 5 U.S.C. § 3312(a)(1). If the answer is yes, the application cannot be processed; if the answer is no, then the age limit must be waived for the preference eligible applicant pursuant to § 3312. Thus, § 3312 does not render § 3307(d) or (e) superfluous. The waiver provision only applies to a small class of applicants -- preference eligibles who are older than the maximum entry age -- and only under specific circumstances -- where the age limit is not essential to the duties of the position.

¶13 Even if we were to assume that the provisions are in conflict, OPM's application of the various canons is not persuasive. For example, OPM contends that the statutory age limit authority provided at § 3307(d)-(e) is a "more specific statute" than the waiver provision at § 3312 and therefore "takes precedence." RF, Tab 8 at 6-7. OPM appears to be invoking the canon that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one...." *Morton*, 417 U.S. at 550-51. However, § 3312(a) could hardly be considered a "general statute." The age waiver provision applies only to a narrow, preferred category of applicants. *Compare Strawberry v. Albright*, 111 F.3d 943, 947 (D.C. Cir. 1997) (The Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq*., which broadly prohibits age discrimination against employees in both public and private sector employment, is a general statute that does not nullify the age limits authorized by § 3307(d)-(e)).

¶14 Next, OPM argues that the Board was required to afford "great deference" to OPM's statutory interpretations in accordance with the Supreme Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984). RF, Tab 8 at 13-15. The Court's decision in *Chevron* describes a two-step process. First, a court must consider whether the intent of Congress is

clear; if it is, then the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress and "that is the end of the matter." 467 U.S. at 842-43. However, if the statute is silent or ambiguous with respect to the specific issue, a court must consider whether the agency's answer is based on a permissible construction of the statute. *Id*. Here, OPM argues that the Board must defer to its regulation at 5 C.F.R. § 338.601(a).[3] The appellant responds that § 338.601(a) only applies to the competitive service and that it merely incorporates 5 U.S.C. § 3307 by reference. RF, Tab 12 at 13-15.

¶15 As discussed above, the pertinent statutes are clear and their application is straightforward; therefore, there is no cause to proceed to the second step of *Chevron*. Even assuming, arguendo, that the statutes are ambiguous, the appellant is correct that 5 C.F.R. § 338.601(a) does not purport to construe any statute. The regulation simply provides a citation to 5 U.S.C. § 3307 without more.[4] OPM contends that the silence in the regulation is meaningful because there is "no exclusion from the restrictions of 5 U.S.C. § 3307(d)-(e) for veterans who undergo an examination for such positions." RF, Tab 8 at 14. However, as noted by the appellant, *see* RF, Tab 12 at 13-14, the age limit waiver for preference eligibles is set out elsewhere in OPM's regulations. *See Roberto v.*

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[3] OPM appears to acknowledge that its "Qualification Standards for General Schedule Positions" are not entitled to *Chevron* deference. RF, Tab 8 at 15. *See Pitsker v. Office of Personnel Management*, 234 F.3d 1378 (Fed. Cir. 2000)(OPM's informal interpretation of a statute is not entitled to *Chevron* deference).

[4] The regulation provides:

> A maximum-age requirement may not be applied in either competitive or noncompetitive examinations for positions in the competitive service except as provided by:
>
> (a) Section 3307 of title 5, United States Code; ...

5 C.F.R. § 338.601.

Department of the Navy, 440 F.3d 1341, 1350 (Fed. Cir. 2006) (When construing a regulation, a court may consider the language of related regulations). OPM's regulation at 5 C.F.R. § 302.202,[5] which applies to excepted service positions such as the agency's Special Agent position, echoes the language of 5 U.S.C. § 3312 in stating that agencies must waive age requirements for preference eligible applicants "when the requirements are not essential to the duties of the position."

¶16 Finally, OPM argues that the maximum entry age requirement is essential to the performance of the duties of the Special Agent position. RF, Tab 8 at 20-26. In support of this argument, OPM relies on legislative history indicating a congressional desire to secure a young and vigorous workforce through enhanced annuity benefits and early retirement eligibility. *Id*. at 22-25. However, OPM does not address the inherent contradiction between the fact that Special Agents are considered sufficiently young and vigorous to perform the duties of the position until they reach the mandatory retirement age of 57, *see* RF, Tab 8 at 24, and the claim that the appellant, on the cusp of age 37, was already too old to perform those same duties.[6] As the Board explained in its decision, courts that have reviewed the legislative history have concluded that the age limits

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[5] Section 302.202 provides, in pertinent part:

> Before making an appointment to a position covered by this part, each agency shall establish qualification standards.... The qualification standards shall include:
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> (a) A provision for waiver by the agency of requirements as to age, height, and weight for each preference eligible when the requirements are not essential to the performance of the duties of the position.

5 C.F.R. § 302.202(a).

[6] OPM asserts that the Board's decision will permit law enforcement officers and firefighters to work into their 60's and 70's. However, this argument assumes too much. The appellant in the instant case does not seek to waive the mandatory retirement age, and therefore that issue is not before us.

authorized by Congress are not grounded on occupational qualifications, but instead are designed to enhance the retirement scheme by allowing individuals to enjoy a full career prior to reaching the mandatory retirement age. *See Isabella*, 106 M.S.P.R. 333 at ¶¶ 34-42 (discussing *Johnson v. Mayor and City Council of Baltimore*, 472 U.S. 353 (1985) and *Stewart v. Smith*, 673 F.2d 485 (D.C. Cir. 1982)). In light of this case law, the Board correctly concluded that the practice of establishing a maximum entry age based on the years of service necessary to qualify for an annuity at the mandatory retirement age is insufficient to establish that the maximum entry age is essential to the performance of the duties of the position.

¶17 OPM does not directly dispute the conclusions reached by the courts in *Johnson* and *Stewart*, but instead contends that those cases are not relevant because they involved claims under the ADEA. RF, Tab 8 at 18. However, these decisions are relevant for two reasons. First, the courts reviewed the same legislative history that has been relied upon by OPM and the agency in this case. Second, the bona fide occupational qualification (BFOQ) exception in the ADEA is very similar[7] to the "essential to the performance of the duties of the position" exception in 5 U.S.C. § 3312. While OPM argues that the Board "wrongly conflates" the two, RF, Tab 8 at 17-18, it does not attempt to explain how an age limit could be "essential," but not a BFOQ. In the absence of any evidence demonstrating that the maximum entry age is essential to the duties of the Special Agent position, the Board correctly concluded that the agency's failure to waive

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[7] Except where a position is exempt from the ADEA, an agency may not set a maximum age requirement for a position unless the Equal Employment Opportunity Commission (EEOC) determines that age is a BFOQ necessary to the performance of the duties of the position. *See* 29 C.F.R. § 1614.201(b). The Board examined the language of both the ADEA, 29 U.S.C. § 633a(b), and 5 U.S.C. § 3312(a)(1) and concluded that "for all practical purposes, the EEOC's determination that age is a BFOQ necessary for the performance of the duties of the position is equivalent to a finding [under § 3312(a)(1)] that age is essential to the performance of the duties of the position." *Isabella*, 106 M.S.P.R. 333 at ¶ 30.

the age requirement violated the appellant's rights under statutes related to veterans' preference in violation of VEOA.

ORDER

¶18 Accordingly, and upon reconsideration, we AFFIRM our final decision in this case, *Isabella v. Department of State*, 106 M.S.P.R. 333 (2007). The Director may seek judicial review in the United States Court of Appeals for the Federal Circuit. 5 U.S.C. § 7703(d).

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees, expert witness fees, and litigation expenses. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 3330c(b). The regulations may be found at 5 C.F.R. §§ 1201.202, 1201.203 and 1208.25. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

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:

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