

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CECIL E. POLLARD,
Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT
and
DEPARTMENT OF HEALTH AND HUMAN
SERVICES,
Respondents.

DOCKET NUMBER
HQ12049110005

DATE: FEB 11 1992

Cecil E. Pollard, Snoqualmie, Washington, pro se.

Lynn A. Garrity, Esquire, Washington, D.C., for the
Office of Personnel Management.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The petitioner, Cecil Pollard, has asked the Board to exercise its authority under 5 U.S.C.A. § 1204(f) (West Supp. 1991) to review rules and regulations issued by the Office of Personnel Management (OPM). Section 1204(f) authorizes the Board to review, in its discretion, any provision of a rule or regulation issued by OPM to determine whether the provision would require or has required the commission of a prohibited personnel practice and, therefore, is invalid on its face or as implemented by an

agency. The petitioner challenges the validity of provisions in Chapters 353 and 630 of the Federal Personnel Manual (FPM) concerning military leave for training duty and the implementation of these provisions by the Department of Health and Human Services (DHHS), his employing agency. Both OPM and DHHS were given an opportunity to respond to the petitioner's request, but only OPM has filed a response. For the reasons stated below, the Board denies the petitioner's request.

BACKGROUND

The petitioner, a DHHS employee and a member of the Naval Reserves, requested and was given 15 days of leave by DHHS for naval reserve training. The petitioner then requested that he be given an additional 15 days of leave for a total of 30 consecutive days of training duty leave. His supervisor at DHHS asked the petitioner for the name and telephone number of his naval reserve unit commander for purposes of attempting to work out with the commander a mutually acceptable schedule for the leave. The petitioner refused to provide this information and, consequently, received an admonishment from the agency for having refused to do so. Nevertheless, the petitioner was given the requested 30 days of leave. The petitioner filed a grievance concerning the admonishment under the negotiated agreement and obtained an adverse decision. Thereafter he filed this request for a regulation review.

ANALYSIS

The petitioner asks the Board to review the guidance provided by OPM concerning the right of reservists in the civil service to unpaid leave of absence "to perform active duty for training or inactive duty training" under 38 U.S.C. § 2024(d). This guidance is contained in FPM Chapter 353, Subchapter 1, "Military Duty - Restoration Rights and Unpaid Leaves of Absence," as revised by FPM Letter 353-5, March 19, 1990.¹ Specifically, the petitioner objects to Subchapter 1-4(c)(3) concerning the resolution of conflicts between military duty and the legitimate needs of the employing agency. Where there is such a conflict, this subsection of the FPM authorizes the agency to contact the commander of the employee's military unit to determine if the leave could be rescheduled or cancelled. The petitioner contends that, in contrast to the FPM, the regulations of the Department of Labor governing military leave for private sector employees do not authorize such contacts by private sector employers and that this difference in the two agencies' regulations denies federal employees the equal

¹ In its response, OPM asserts that the petitioner has failed to cite a rule or regulation that he is challenging. If OPM is contending that a provision of the FPM is not a "rule" for purposes of 5 U.S.C. § 1204(f), it is mistaken. An FPM provision which meets the definition of "rule" in 5 U.S.C. § 551(4) is a rule for purposes of the Board's regulation review authority. *National Treasury Employees Union v. Devine*, 8 M.S.P.R. 640, 642 n. 1 (1981). We find that the provision at issue here, which is designed to implement the military leave statute, meets the statutory definition.

protection of the laws.²

The petitioner has not identified what prohibited personnel practice is at issue or explained why this provision of the FPM would require an employee to commit a prohibited personnel practice, as 5 C.F.R. § 1203.11(b) requires a request for regulation review to do. Petitioner's assertion that the provision violates the Equal Protection Clause does not by itself state a violation of 5 U.S.C. § 2302(b). It is true that the alleged denial of equal protection would be inconsistent with the merit principle which requires all employees and applicants for employment to be treated "with proper regard for their ... constitutional rights." 5 U.S.C. § 2301(b)(2). However, the legislative history of the merit systems principles indicates that they were not intended to be self-executing. *Wells v. Harris*, 1 M.S.P.R. 208, 215 & n.11 (1979). "Unless a law, rule or regulation implementing or directly concerning the principles is violated (as under section 2302(b)(11)), the principles themselves may not be made the basis of a legal action by an employee or agency." H. Conf. Report No. 1717, 95th Cong., 2d Sess. 128 (1978). Section

² The petitioner also asks the Board to review part of FPM Chapter 630 concerning military leave for members of the Armed Forces Reserves and the National Guard, citing Chapter 630-30. However, there is no subchapter 30 and page 630-30 addresses leave for child care and related matters. The petitioner may have intended to cite subchapter 9 (pages 630-21 & 630-22), the part of Chapter 630 addressing military leave, but in any event he has not alleged that any particular provision in Chapter 630 is invalid.

2302(b)(11) makes it a prohibited personnel practice to violate any law, rule or regulation implementing or directly concerning the merit systems principles, and the Board would have authority to review a claim that the FPM provision at issue here would require violation of such a law. However, the petitioner has not identified a law, rule or regulation implementing or directly concerning section 2301(b)(2), the merit systems principle which incorporates his constitutional right to equal protection. Nor is the Board aware of any law or regulation requiring the identical treatment of federal and private sector employees.³

The gravamen of the petitioner's challenge to the FPM provision is apparently that it is likely to result in interference with the reservist's right to leave for required military training. However, we note that FPM Chapter 353, Subchapter 1-4(c)(3) provides that, when the agency contacts the military commander about a conflict, "[i]f the military authorities or commander determine[s] that the training or duty cannot be rescheduled or cancelled, the agency is required to permit an employee to take military duty, whether the duty is voluntary or involuntary." Under the circumstances, assuming *arguendo*

³ For purposes of the two-step analysis required under section 2302(b)(11), see *Wells v. Harris*, 1 M.S.P.R. at 215, the constitutional provision which the merit systems principle in section 2301(b)(2) incorporates cannot, of course, be both the merit systems principle and the violated law, rule or regulation which implements or directly concerns the merit systems principle.

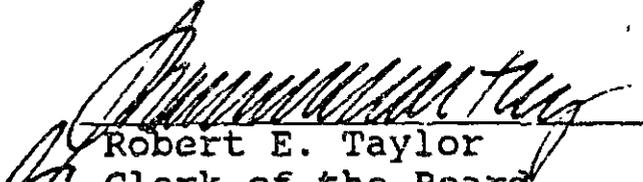
that interference with required military leave would be a prohibited personnel practice, we see no basis for concluding that such interference is a reasonably foreseeable result of the FPM provision warranting invalidation of the provision by the Board. See *Wells v. Harris*, 1 M.S.P.R. at 246-47 (a rule "would require" a prohibited personnel practice if it is reasonably foreseeable that it will result in such a practice). Cf. *In re Exceptions from Competitive Merit Plans*, 9 M.S.P.R. 116, 119 (1981) (the mere possibility that a rule may be implemented in such a way as to violate section 2302(b) does not make such implementation reasonably foreseeable and warrant invalidation of the rule under the Board's regulation review authority).

The petitioner also contends that DHHS has invalidly implemented the FPM provision authorizing it to contact the commander of his reserve unit because the agency admonished him for failing to provide his commanding officer's name and phone number when he was requested to do so. The petitioner contends that the FPM provision does not clearly require the employee to provide the name and phone number of the reserve unit commander, and he argues that he was justified in not providing this information because of the possibility his supervisor would mislead the commanding officer about the agency's reasons for objecting to military leave or would violate the petitioner's alleged privacy interest in his job performance. However, the petitioner again does not explain

how the agency's request for the information or its admonishment of the petitioner for his failing to provide it violated section 2302(b) or required an employee to commit a prohibited personnel practice. In the absence of an alleged prohibited personnel practice by the agency, 5 U.S.C. § 1204(f)(2)(B) gives the Board no authority to review the agency's interpretation and implementation of the FPM. See *Johnson v. U.S. Customs Service, Department of the Treasury*, 31 M.S.P.R. 104, 107 (1986) (the validity of agency's failure to implement an OPM rule was not within the Board's regulation review jurisdiction in the absence of an allegation the agency's failure was a prohibited personnel practice).

Accordingly, because the petitioner has failed to identify a prohibited personnel practice required by the FPM provision which he challenges, the request for regulation review is DENIED.

FOR THE BOARD:



Robert E. Taylor
Clerk of the Board

Washington, D.C.