

United States Court of Appeals for the Federal Circuit

EDWARD M. AVALOS,
Petitioner

v.

**DEPARTMENT OF HOUSING AND URBAN
DEVELOPMENT,**
Respondent

2019-1118

Petition for review of the Merit Systems Protection
Board in No. DE-0752-18-0004-I-1.

Decided: June 26, 2020

RICHARD RANDOLPH RENNER, Kalijarvi, Chuzi, Newman & Fitch, PC, Washington, DC, argued for petitioner.

ELIZABETH ANNE SPECK, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent. Also represented by JOSEPH H. HUNT, TARA K. HOGAN, ROBERT EDWARD KIRSCHMAN, JR.; NADIA K. PLUTA, Office of General Counsel, United States Office of Personnel Management, Washington, DC; MARCUS R. PATTON, MAUREEN E. VILLARREAL, Office of General Counsel, United States

Department of Housing & Urban Development, Fort Worth, TX.

Before REYNA, WALLACH, and HUGHES, *Circuit Judges*.
HUGHES, *Circuit Judge*.

This is a case about the removal of a federal employee who was illegally appointed to his position in the civil service. Mr. Edward M. Avalos appealed his removal from employment as the Field Office Director in Albuquerque, New Mexico, for the United States Department of Housing and Urban Development to the Merit Systems Protection Board. Because the Board correctly found that it had jurisdiction to review Mr. Avalos's appointment and because substantial evidence supports the agency's decision to remove Mr. Avalos to correct his illegal appointment, we affirm.

I

A

In October 2009, Mr. Avalos was confirmed as the Under Secretary of Agriculture for Marketing and Regulatory Programs at the United States Department of Agriculture, a Level III Senior Executive Schedule position in the excepted service. *See* 5 U.S.C. § 5314. During his nearly eight-year tenure at the USDA, Mr. Avalos crossed paths with Ms. Tammye Treviño, a fellow USDA political appointee then serving as the Administrator for Rural Housing Service. In September 2015, HUD announced that it needed to fill a vacancy for the Field Office Director position in its Albuquerque office. Ms. Treviño, now working

at HUD, was involved in developing this vacancy announcement and reviewing candidates.¹

Mr. Avalos applied for this Field Office Director position, but he did not make the certificate of eligible candidates from which selection would be made. The certificate listed only one candidate, a preference-eligible veteran. Ms. Treviño, apparently disappointed with the applicant choices, sought to consider additional candidates who were qualified, but not preference eligible. She did not, however, complete a pass-over request under 5 C.F.R. § 3318(a), (c)(1), which would allow her to consider additional candidates, instead letting the certificate of eligibles expire.

Before the certificate of eligibles for the first vacancy announcement expired, Ms. Treviño began revising the vacancy announcement; after the first certificate expired, HUD again announced the vacancy. Mr. Avalos applied once more. This time he was the only candidate listed on the certificate of eligibles. According to Ms. Treviño, she had recused herself from acting as the selecting official after seeing Mr. Avalos's name on this certificate of eligibles, but some ambiguity remains about the manner, scope, and timing of Ms. Treviño's recusal.

¹ The parties dispute whether Ms. Treviño acted as the "selecting official"—"the person having the authority, by law, or by duly delegated authority, to appoint, employ, or promote individuals to positions in an agency," J.A. 40—for this position. HUD suggests that Ms. Treviño received the certificate of eligibles, which, regardless of other facts, makes her the selecting official. *See* Resp. Br. 9, 13; *see also* J.A. 599. Mr. Avalos points out Ms. Treviño's testimony that her manager, Ms. Mary McBride, was always acting as the selecting official, to assert otherwise. *See* Pet. Br. 4; J.A. 643, 649–50.

HUD interviewed Mr. Avalos and selected him for the position, subject to the completion of a one-year probationary period. He became HUD's Albuquerque Field Office Director effective September 18, 2016, the day following his resignation from the USDA.

B

In April 2017, during regular review of appointments to the competitive service, the Office of Personnel Management (OPM) noted that HUD had appointed Mr. Avalos without OPM approval. OPM requested information from HUD and also sought to obtain information about Mr. Avalos's appointment on its own. After concluding its investigation, OPM advised HUD that it would not have approved HUD's appointment of Mr. Avalos, and instructed HUD to "regularize" the appointment.² J.A. 154.

After receiving OPM's directive, HUD's Human Capital Division—specifically Ms. Heather Dieguez, Director of the Office of Accountability—reviewed Mr. Avalos's appointment and reconstructed his hiring record.

² "Case law has described regularizing an appointment as correcting the illegal component of the appointment." *Endres v. Dep't of Veterans Affairs*, 107 M.S.P.R. 455, 463 (2007) ("[B]ecause the agency has not shown that [petitioner's] appointment was regularized by either a variation or by correcting the illegal component of the appointment, [petitioner's] appointment . . . is not valid."), *enforcement dismissed*, 108 M.S.P.R. 606 (2008); *see also Avalos v. Dep't of Hous. & Urban Dev.*, No. DE-0752-18-0004-I-1, at 6 (M.S.P.B. July 19, 2018) ("Various witnesses testified that, to 'regularize' an appointment means to find a legal appointment authority, or to release or remove the employee."); *Regularize*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("To make (a situation that has existed for some time) legal or official.").

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Ms. Dieguez sought to determine independently whether Mr. Avalos's appointment met all merit and fitness requirements. After investigating, she found no intent to grant an unauthorized preference by HUD officials. Nevertheless, she determined that she could not certify that the appointment met merit and fitness requirements because Ms. Treviño's involvement in interviewing and selecting candidates left the "appearance of a prohibited personnel practice." J.A. 442. Because HUD could not certify that Mr. Avalos's appointment met all merit and fitness requirements, and because Ms. Dieguez could not find a separate non-competitive appointment authority for Mr. Avalos, she concluded that HUD needed to remove Mr. Avalos to regularize his appointment.

On August 16, 2017, Ms. Dieguez notified Mr. Avalos that HUD may have to remove him because of the impropriety in his appointment. On August 31, she issued him a formal Notice of Proposed Termination. On September 13, HUD's deciding official issued Mr. Avalos her Decision on Notice of Proposed Termination, removing him effective September 14, 2017.

II

Mr. Avalos appealed his removal to the Merit Systems Protection Board. The government argued that the Board lacked jurisdiction because Mr. Avalos was removed before the end of his one-year probationary period. In response, the Board first ruled on its jurisdiction to review Mr. Avalos's appointment in a separate jurisdictional order. The Administrative Judge found that the Board had jurisdiction because Mr. Avalos met the definition of "employee" provided in 5 U.S.C. § 7511(a)(1)(A)(ii).³ See 5 U.S.C.

³ Section 7511(a) provides that "[f]or the purpose of this subchapter[,] 'employee' means an individual in the competitive service who is not serving a probationary or

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