IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-20522
Summary Calendar

LARRY J. GALVIN,

Plaintiff-Appellant,

VERSUS

FEDERAL DEPOSIT INSURANCE CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-94-0390)

(February 16, 1995)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:[*]

Larry Galvin appeals the dismissal of his claims against his former employer under the Veteran's Preference Act, Civil Service Reform Act, and Fifth Amendment. Finding no error, we affirm.

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[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Galvin was first employed by the FDIC as a Liquidation Grade employee in the excepted service in February 1989. Galvin's was a temporary appointment not to exceed one year. The Notice of Personnel Action, Standard Form 50-B (SF-50), issued at the time of his appointment, stated that Galvin was entitled to a five-point Veteran Preference.

Galvin's appointment was renewed annually for the next three years. The SF-50 noting each renewal indicated Galvin's preference-eligible status as a veteran and stated that the appointment was not to exceed one year.

One month prior to the expiration of Galvin's last appointment, he received notification that the appointment would not be renewed. Following the non-renewal, excepted service FDIC employees who were not preference eligible were transferred into Galvin's section; one such employee took Galvin's position.

Galvin appealed the non-renewal to the Dallas Regional Office of the Merit Systems Protection Board ("MSPB"). The administrative judge held that, under the applicable regulations, Galvin's non-renewal was not an adverse personnel action, and therefore the MSPB had no jurisdiction under the provisions for appeal to the MSPB in the event of an adverse personnel action. Galvin did not appeal this decision to either the MSPB or the Court of Appeals for the Federal Circuit, but instead sued the FDIC.

Galvin asserts that the FDIC was actually conducting a reduction in force ("RIF") by allowing NTE appointments to expire

without renewal. He states that, in the event of a RIF, he should have been retained in preference to competing employees who were not preference-eligible. Galvin contends that, as a preference-eligible employee in the excepted service, he had an expectation of continued employment so long as there was work available and his performance rating was satisfactory.

The FDIC moved for dismissal under FED. R. CIV. P. 12(b)(6), or, in the alternative, for summary judgment, alleging that Galvin's status as an excepted service employee whose temporary appointment had not been renewed upon expiration had no recourse under the protections of the Civil Service Reform Act ("CSRA"). Further, the FDIC contended that Galvin's temporary appointments did not create a property interest cognizable under the Fifth Amendment.

The parties consented to trial by a magistrate judge, who granted the motion to dismiss, or, in the alternative, for summary judgment. The magistrate judge held that there was no violation of the Veterans Preference Act where an excepted appointment is merely allowed to expire. She did not resolve the issue of whether a RIF was being conducted, because she held that even if there was a RIF, RIF procedures do not apply to termination of a term appointment at its scheduled expiration date.

Finally, the magistrate judge found no merit in Galvin's claim that the FDIC violated his rights by failing to maintain a reemployment register, because Galvin had never asked to be placed on the register. As to the constitutional claim, the magistrate judge held that as an excepted service employee, Galvin had no

property interest in his employment such as would entitle him to protection under the Fifth Amendment.

II.

The FDIC has raised, for the first time on appeal, the question of whether CSRA precludes judicial review of Galvin's claims by the federal district court. Federal courts are courts of limited jurisdiction. Absent jurisdiction conferred by statute, district courts lack the power to consider claims. Veldhoen v. United States Coast Guard, 35 F.3d 222, 225 (5th Cir. 1994). If, in fact, the exclusivity of the CSRA as a remedy for federal employees forecloses judicial review, under other statutes, of claims arising from personnel actions, such a bar would result in a lack of subject matter jurisdiction over such claims. Witzkoske v. U.S.P.S., 848 F.2d 70, 73 (5th Cir. 1988).

The issue of subject matter jurisdiction may be raised for the first time on appeal. Veldhoen, 33 F.3d at 225. Also, this court may affirm the district court's dismissal or summary judgment on any other ground supported by the record. See, e.g., Chevron U.S.A., Inc. v. Traillour Oil Co., 987 F.2d 1138, 1146 (5th Cir. 1993).

In United States v. Fausto, 484 U.S. 439 (1988), the Court held that CSRA is a comprehensive statute meant to provide one integrated system of administrative and judicial review of adverse personnel actions. The Court held that CSRA's failure to provide a certain class of employees with administrative or judicial review

of adverse personnel actions represents a congressional judgment that judicial review should not be available.

Fausto was a nonpreference eligible in the excepted service who had been discharged by the Department of the Interior Fish and Wildlife Service ("FWS") without being informed of his grievance rights. 484 U.S. at 441-42. Fausto petitioned the MSPB for review of his removal. Id. at 442. The MSPB dismissed the appeal on the ground that under CSRA, a nonpreference eligible in the excepted service has no right to appeal to the MSPB. Later, the FWS admitted Fausto had not been informed of his grievance rights and allowed him to challenge his removal under FWS internal procedures. As a result of those proceedings, FWS admitted that Fausto at most should have been suspended for thirty days, not removed, and offered Fausto back pay from the time his suspension would have ended until the time the facility at which he was working closed. Id.

Fausto refused the offer, contending he was entitled to back pay for the period of the suspension through the date on which the FWS admitted he should not have been removed. Fausto appealed to the Secretary of the FWS, which upheld the FWS's decision. 484 U.S. at 442.

Fausto filed an action in the Court of Claims under the Back Pay Act, 5 U.S.C. § 5596. That court dismissed, holding that CSRA comprised the exclusive remedies for civil servants affected by adverse personnel actions. The Federal Circuit reversed and remanded, holding that although CSRA does not afford nonpreference

eligible excepted service employees a right to appeal to the MSPB, it does not preclude them from seeking review by the Claims Court alleging a violation of the Back Pay Act and basing jurisdiction on the Tucker Act, 28 U.S.C. § 1491. 484 U.S. at 443.

The Supreme Court reversed the Federal Circuit, noting that CSRA prescribes in great detail the protections and remedies applicable to adverse personnel actions against federal employees, including the availability of administrative and judicial review. 484 U.S. at 443. As no provision offered nonpreference eligibles in the excepted service a right of review of a suspension for misconduct, the Court framed the question as whether the absence of a remedy in the statute was meant to preclude judicial review for those employees, or was meant to permit the pursuit of remedies that had been available prior to the enactment of CSRA. Id. at 443-44.

Examining the purpose and legislative history of CSRA, the Court found a congressional intent to replace completely the haphazard arrangements for judicial and administrative review of personnel actions, previously a patchwork that had been built up over almost a century. 484 U.S. at 444. The Court then reviewed the remedies provided in the statute for personnel actions, noting that the statute provides explicitly for the situation of nonpreference members of the excepted service, granting them limited rights. Id. at 445-47. In certain provisions, nonpreference eligibles in the excepted service are not even included in the definition of "employees." 5 U.S.C.

§ 7511(a)(1)(B).

The Court rejected the view, taken by the court of appeals, that the failure to provide for certain employees constituted "congressional silence" on the issue of what review these employees should receive, leaving them free to pursue whatever judicial remedies existed before the enactment of CSRA. 484 U.S. at 447. "In the context of the entire statutory scheme, we think it displays a clear congressional intent to deny the excluded employees the protections of Chapter 75--including judicial review--for personnel action covered by that chapter." Id. Any other reading would provide more remedies to nonpreference eligibles than preference eligibles are entitled to under the statute, a result contrary to the entire structure and purpose of the statute. Id. at 449-50. Moreover, allowing actions in various federal courts, and appeals to different circuit courts, would defeat consistency of interpretation by the Federal Circuit as envisioned by CSRA. Id. at 451.

Under Fausto, then, the question is what rights an employee in Galvin's service category is afforded under CSRA, and whether Congress intended such employees to have resort to remedies not provided in CSRA. Galvin is a preference-eligible employee in the excepted service with a temporary or NTE appointment.

Section 7701(a) provides that "[a]n employee . . . may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation." Chapter 75 of CSRA provides that an employee may appeal to

the MSPB in the event of adverse personnel actions such as removal or suspension. 5 U.S.C. §§ 7513(d), 7512(1), (2). Section 7511 includes preference eligibles in the excepted service in its definition of "employees," thus giving this category of employees the right to appeal an adverse personnel action to the MSPB. Section 7514 allows the Office of Personnel Management to prescribe regulations to carry out the purposes of the subchapter. The applicable regulations also provide that an employee who is terminated as a result of a reduction in force, as Galvin claims he was, has a right of appeal to the MSPB. 5 §§ 351.901, 351.1201.3(a)(10).

Galvin's status, then, gave him the right to appeal certain actions to the MSPB. CSRA nowhere grants any employee, whether in the excepted or competitive service, the right to bring an action in federal district court. Galvin's removal is not reviewable in federal court. As in Fausto, the rights of employees in his service category have been detailed by Congress.

Galvin argues, in response, that the MSPB ruled that it was without jurisdiction in this matter, and therefore that jurisdiction is proper in the federal district court. To be sure, the administrative judge ("AJ") noted that, under the applicable regulations, when an expiration date of an appointment is specified as a basic condition of employment when the appointment is made, the expiration of the appointment is not an "adverse action" appealable to the board. 5 C.F.R. § 752.401(c)(6). Thus, the AJ ruled that the MSPB lacked jurisdiction over the case. Galvin,

however, offers no explanation why the MSPB's lack of jurisdiction should be tantamount to a grant of jurisdiction in federal court. The MSPB similarly lacked jurisdiction in Fausto and yet, based upon the comprehensive nature of CSRA, the Court found that the lack of remedy in the statute precluded Fausto from bringing suit challenging the personnel action in federal court.

Galvin states that his is a due process claim based upon the Veterans Preference Act and that the federal district court has exclusive jurisdiction to award money damages for due process claims. Under the Fausto holding, however, a federal employee may not expand the remedies provided under the statute for adverse personnel actions by resort to pre-CSRA remedies. See 484 U.S. at 450 n.3. This court has noted with approval the disposition of similar cases in other circuits to the effect that CSRA provides the exclusive remedy for preference eligible as well as nonpreference eligible employees who challenge personnel actions. McAuliffe v. Rice, 966 F.2d 979, 980-81 (5th Cir. 1992) (citing Stephens v. Department of Health & Human Servs., 901 F.2d 1571, 1576 (11th Cir.), cert. denied, 498 U.S. 998 (1990), and Ryon v. O'Neill, 894 F.2d 199, 200 (6th Cir. 1990)).

Galvin's claims arise out of his employment relationship with the United States, and CSRA provides the exclusive mode of redress. His claim in federal district court was properly dismissed.

AFFIRMED.