Service Women's Action Network: Compelling Patent Office Rulemaking

While it is theoretically possible to petition the Patent Office to compel rulemaking, the burden to due so is quite high, as manifested by *Service Women's Action Network v. Sec'y of Veterans Affairs*, __ F.3d __ (Fed. Cir. Mar. 3, 2016)(Hughes, J.), following *Preminger v. Sec'y of Veterans Affairs,* 632 F.3d 1345 (Fed. Cir. 2011). The third member of the panel differed based on the facts, *Service Women's Action Network* __ F.3d at __ (Wallach, J., dissenting).

In *Service Women's Action Network* , a panel majority denied a petition that the Government provide rulemaking to deal with "a growing recognition of the pervasive and continuing problem of sexual abuse in the military[.]" The petition was denied based upon the extremely high burden a petitioner must surmount. Citing *Preminger v. Sec'y of Veterans Affairs,* 632 F.3d 1345, 1353-54 (Fed. Cir. 2011), "[w]hen a proposed rulemaking 'pertains to a matter of policy within the agency's expertise and discretion, the scope of review should perforce be a narrow one, limited to ensuring that the agency has adequately explained the facts and policy concerns it relied on and to satisfy ourselves that those facts have some basis in the record.'"

Further text from the majority opinion is attached below.

Regards,
Hal

March 3, 2016

From the Opinion:

[W]e review the Secretary's denial of a petition for rulemaking pursuant to 5 U.S.C.§ 706(2)(A) to determine whether the agency's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." [*Preminger v. Sec'y of Veterans Affairs,* 632 F.3d 1345, 1353 (Fed. Cir. 2011)] (citing *Massachusetts v. EPA*, 549 U.S. 497, 527–28 (2007)). When a proposed rulemaking "pertains to a matter of policy within the agency's expertise and discretion, the scope of review should perforce be a narrow one, limited to ensuring that the agency has adequately explained the facts and policy concerns it relied on and to satisfy ourselves that those facts have some basis in the record." *Id*. at 1353–54 (quoting *WWHT, Inc. v. FCC*, 656 F.2d 807, 817 (D.C. Cir. 1981)) (internal quotation marks omitted)."In other words, a court 'looks to see whether the agency employed reasoned decision making in rejecting the petition.'" *Id*. at 1354 (quoting *Defs. of Wildlife v. Gutierrez*, 532 F.3d 913, 919 (D.C. Cir. 2008) (alteration in original omitted)).

To determine if the agency employed reasoned decision making, "we must examine the petition for rulemaking, comments pro and con . . . and the agency's explanation of its decision to reject the petition." *Gutierrez*, 532 F.3d at 920 (quoting *Am. Horse Prot. Ass'n v. Lyng*, 812 F.2d 1, 5 (D.C. Cir. 1987)) (internal quotation marks omitted). In only the "rarest and most compelling of circumstances" is it appropriate to overturn an agency judgment not to institute a rulemaking. *WWHT, Inc.*, 656 F.2d at 818; *see also Nat'l Customs Brokers & Forwarders Ass'n of Am. Inc. v. United States*, 883 F.2d 93, 96–97 (D.C. Cir. 1989) ("We will overturn an agency's decision not to initiate a rulemaking only for compelling cause, such as plain error of law or a fundamental change in the factual premises previously considered by the agency.").

* * *

Although others may have determined that petitioners' requested rule is the best way to ensure the accurate, fair, and sensitive adjudication of [the] claims, that is not the question before us. Ultimately, we are bound by the very limited and highly deferential standard of review, which only allows us to determine if the Secretary's denial constitutes reasoned decision making. Because the Secretary adequately explained its reasons for denying the petition and continuing with the status quo, we conclude that the denial was not arbitrary or capricious.