UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

CHOE R. COLEMAN, ROBERT C. CLOWERS, DONALD B. PAINTER, STEVEN M. PALMER, VURL D. HICKS, appellant, v. TENNESSEE VALLEY AUTHORITY, agency.	)	DOCKET NUMBERS AT03518310533 AT03518310534 AT03518310555 AT03518310556 AT03518310558 Date: 23 OCT 1984

OPINION AND ORDER

Background

Appellants have petitioned for review of the September 27, 1983, initial decision which affirmed their separations from positions as Electrician Welder-Assignees (assignee positions) with the agency during a reduction-in-force (RIF) action.[1/] They contend, as they did before the presiding official, that the RIF was flawed because the competitive level from which they were released was improperly constituted in that it did not include Journeyman Electrician Welder positions (journeyman positions) which, they assert, performed the same work as they did in the

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1/ Appellants' cases were consolidated by a May 6, 1983, regional office order. No party has objected to that consolidation to date, with appellants filing a consolidated petition for review and the agency filing a response thereto. We find that maintaining the consolidation on review will be more expeditious than separate adjudication of each appeal and that such consolidation will not adversely affect any party. See 5 U.S.C. § 7701(f).

assignee positions.[2] The agency maintains that the assignee and journeyman positions are not equivalent and that even if they are, the presiding official correctly upheld the use of separate competitive levels because they were required by the applicable collective bargaining agreement.

Before the presiding official, the parties stipulated that the pay and benefits for the assignee and journeyman positions were the same and that the primary task for both positions was welding.[3] I.D. at 4. The agency, however, attempted to justify the use of separate competitive levels by showing that an added qualification was required for the journeyman positions. The journeymen were qualified as both journeyman electricians and journeyman welders, whereas the assignees were only qualified as journeyman welders.[4] Because of this added qualification, the agency argued that

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[2] We note that in their petition, appellants do not take issue with the presiding official's finding regarding the bona fide reason for conducting the RIF and we concur in the presiding official's conclusion, Initial Decision (I.D.) at 2-3, that lack of work was the proven, legitimate reason for the RIF. See Losure v. Interstate Commerce Commission, 2 MSPB 361 (1980) (the agency has the burden of proving that a RIF was undertaken for a legitimate management reason, such as lack of work).

[3] These welding tasks were performed with members of the electrician craft as opposed, for example, to the welding done by ironworkers and millwrights. I.D. at 4.

[4] Although there are no official positions of record documenting the requisite qualifications for each position, appellants conceded the existence of the added qualification for the journeyman positions and each appellant acknowledged that he did not meet this qualification. I.D. at 4. Appellants do, however, challenge the uniformity with which the additional qualification was required by the agency in its actual hiring practice. See infra.

the journeymen could perform certain electrical work for which the assignees were not qualified. Id.

Moreover, the agency contended that the distinction permitted it the flexibility to hire individuals with less than the optimal qualifications when the labor market was tight and a sufficient number of qualified journeymen could not be found to meet production needs. However, to accomplish this desired flexibility and because the union referred all job candidates to it under the collective bargaining agreement, the provision noting the different competitive levels for the assignee and journeyman positions was negotiated as part of the agreement. As such, the agency argued, it represented a separate, but related, justification for use of the two competitive levels for RIF purposes.5/ I.D. at 9.

The presiding official did not accept the first of these arguments, finding that the agency had not invariably filled the journeyman positions with qualified journeyman electrician welders;6/ and more importantly that, regardless

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5/ The collective bargaining agreement was not entered into the record but both parties agree that it contained a provision mandating separate competitive levels for assignee and journeyman positions, which was negotiated as part of the collective bargaining process prior to the RIF. See I.D. at 8-9.

6/ The presiding official based this finding on the testimony of two former journeymen that they had not completed the formal apprenticeship necessary to be qualified journeyman electricians prior to being hired to the journeymen positions. Further, the presiding official noted the admissions of two agency officials that not all journeymen in fact met journeyman electrician qualifications (although these officials dismissed the admitted aberrations as personnel errors). I.D. at 4-5.

of the difference in the formal qualifications necessary for each position, the assignees and journeymen employed prior to the RIF performed only identical welding tasks and no electrical work which necessitated qualification as a journeyman electrician.7/ I.D. at 4-6. Thus, the presiding official held that, in the absence of the provision from the collective bargaining agreement, the assignee and journeyman positions should have been placed in the same competitive level. I.D. at 8.

The presiding official classified the effect of the agreement's mandate of separate competitive levels as a de facto waiver of appellants' (as assignees) right under RIF procedures to be placed in a competitive level with similar jobs. I.D. at 9. She found, however, that the terms of the agreement were binding, I.D. at 9-10, that the right to be in a properly constituted competitive level was waivable, I.D. at 10-12, and the waiver was clearly made in the instant case. I.D. at 13. Accordingly, she affirmed appellants' separations under the RIF. Id.

Discussion

As the presiding official found, the right to a properly constituted competitive level is a substantive RIF requirement and thus the agency had the burden of proving that appellants' competitive level was properly defined. Speaker v. Department of Education, 11 MSPB 430, 431 (1982); Foster v. Department of Transportation, 7 MSPB 707, 708-710 (1981); Ray v. Department of the Air Force, 3 MSPB 516 (1980). Further, 5 C.F.R. § 351.403(a) provides,

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7/ The presiding official based this finding on the testimony of the same two former journeymen, who had since become agency electricians (wiremen). They testified that wiremen performed all the specialized electrical tasks while assignees and journeymen were limited to welding tasks. I.D. at 5-6.

in pertinent part, that competitive levels shall consist of:

> [A]ll positions in a competitive area and in the same grade or occupational level which are sufficiently alike in qualification requirements, duties, responsibilities, pay schedules, and work conditions, so that an agency readily may assign the incumbent of any one position to any of the other positions without changing the terms of his appointment or unduly interrupting the work program.

See also Federal Personnel Manual (FPM) Ch. 351, 2-3 (1981).

With the parties' stipulation that the assignees and journeymen received equal pay and the presiding official's findings, to which we defer,[8/] regarding the identical duties actually performed, the sole justification for the separate competitive levels, aside from the collective bargaining agreement's mandate, is the additional qualification required — journeyman status as electricians. We disagree, however, with the presiding official's conclusion that the journeyman electrician

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8/ See Weaver v. Department of the Navy, 2 MSPB 297, 298-99 (1980) (deference to the presiding official's factual and credibility findings absent error demonstrated by specific references to the record).

skills could not form the basis for separate classifications because they were not put to use prior to the RIF.9/

Regardless of whether the qualification was utilized prior to the RIF, the agency presented a persuasive explanation as to why journeymen were more valued employees (i.e., their ability to perform unsupervised electrical work); and coupled this explanation with proof, through signed waivers, that each appellant was aware of the qualification distinction between assignees and journeymen from the outset of his employment (each appellant additionally admitting he lacked the required electrician certification). See I.D. at 3 n.5 and 4. We find these actions sufficient to preserve the distinction between the two positions even though the agency failed to establish that the distinction was utilized in fact. Holliday v. Department of the Army, 17 MSPB 14, 16 (1982) (while two positions may function almost identically, the fact that

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9/ Additionally, although the presiding official also listed the agency's hiring unqualified electricians as journeymen as a reason for finding that absent the collective bargaining agreement separate competitive levels would not have been justified, we find insufficient proof for this factual finding. See Weaver, supra at 298 (Board's freedom to substitute its factual findings when warranted). The sole evidence upon which she relied to find the agency hired unqualified persons as journeymen was the testimony of two former journeymen that they were not qualified when they served in these positions. See n.6 supra. We find this does not show a practice of hiring unqualified journeymen that would eliminate the valid qualification requirement. Rather it establishes only, as agency admitted, the possibility of limited personnel errors.

one of them requires a greater degree of training justifies separate competitive levels).

Moreover, besides being additional evidence of the agency's preservation of a distinction between assignees and journeymen, the collective bargaining provision is, as the presiding official found, a separate justification for the use the two competitive levels. The Board has held that the provisions of a collective bargaining agreement may, as here, "represent guiding principles and established nondiscretionary policy" under which the agency operates and which have "the effect of regulatory requirements." Jones v. Tennessee Valley Authority, 9 MSPB 550, 551 (1982), citing Giesler v. Department of Transportation, 3 MSPB 367, 368 (1980). Thus, the Board will enforce rights derived from that negotiated agreement, as well as agency-created RIF rights.10/ See Deck v. Department of the Army, 7 MSPB 443 (1981). Further, given our findings regarding the propriety of the separate competitive levels under 5 C.F.R. § 351.403(a), we do not find the application of this provision to constitute a waiver of appellants' substantive RIF rights.

In sum, we find that reduction-in-force procedures were properly invoked in both instances, and that the appellants were appropriately released from their respective competitive levels, there being no employees with lesser retention rights remaining therein.

10/ Varying contractual procedures could subject the agency to possible meritorious grievances, and to possible unfair labor practice charges. See TWA v. Hardison, 432 U.S. 63, 78 (1977).

Accordingly, the petition for review is hereby GRANTED, the initial decision is AFFIRMED as MODIFIED herein and the agency actions separating appellants are SUSTAINED.

This is the final decision of the Merit Systems Protection Board in these appeals. 5 C.F.R. § 1201.113(c).

Each appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

Stephen E. Manrose
Acting Clerk of the Board

Washington, D.C.