UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JACK E. KETTERER
v.
U.S. DEPARTMENT OF AGRICULTURE, FEDERAL CROP INSURANCE CORPORATION

Docket No. SL075299021

OPINION AND ORDER

I. STATEMENT OF THE FACTS

This case came before the Board on a petition for review filed by appellant requesting that the Board reverse the initial decision of its St. Louis Field Office upholding the decision of the Federal Crop Insurance Corporation ("the agency") to remove him.

Appellant was a District Director assigned to the Lincoln, Nebraska Regional Office of the agency. In February 1979 he was notified that he would be reassigned to the Operational Services Branch of the National Service Office in Kansas City, Missouri, to assume the position of Crop Insurance Specialist at the same grade and pay. The sole explanation given at that time for the reassignment was that "It is management's decision that your experience, knowledge and expertise can be more effectively utilized in providing staff guidance and direction in the [National Service Office]."[1]

Appellant refused the reassignment, contending that it was "grossly unfair." In support of this claim appellant pointed out that only one year earlier he had accepted a reduction in grade from a GS–13 to a GS–12 in order to maintain his residence in Lincoln rather than be reassigned to the National Service Office.[2] The agency then proposed to remove appellant for his refusal to accept the reassignment, and provided him with the opportunity to make written and oral reply to the proposed removal.[3] Appellant availed himself of both opportunities.[4]

[1] Letter to appellant from Doris E. Cremins, Personnel Officer (February 26, 1979).

[2] Letter to Doris E. Cremins from appellant (March 28, 1979).

[3] Letter to appellant from Doris E. Cremins signing for Mathew B. Richter. (Letter was received by appellant April 7, 1979—no date is indicated on its face.)

[4] By letter dated April 13, 1979, appellant requested an oral hearing upon his proposed removal and further requested that it be attended by the " . . . individual who

Appellant's written reply to the proposed removal consisted of basically three challenges to the propriety of the reassignment. First, he contended that since the unit to which he had been assigned already had five people who were extremely under-utilized, there was no need for his services. Moreover, he argued that this unit, known as the 'bone pile", was actually used by the agency to encourage employees assigned to it to leave the agency and that it was "unreasonable to expect an employee to accept a transfer in order to cover up this situation."

Second, appellant alleged that there was no ascertainable managerial motive for this reassignment nor could he identify any person who had requested his services. Therefore, he concluded that there had to be some "strong ulterior motive" for his reassignment. Appellant pointed out that this conclusion was buttressed by the fact his services were clearly needed in Lincoln.

Finally, appellant argues that it was "double jeopardy" to reassign him as a GS–12 after he had taken a demotion approximately a year before to avoid a similar move. Appellant claimed that this was the fourth attempt to reassign him from Lincoln because of unspecified personal feelings of the Regional Office Management and that "it defies common sense to reach the conclusion that the fourth and current transfer is anything beyond an extension of the previous attempts."[5]

In accordance with appropriate procedures, appellant was provided an opportunity to make his oral reply to a neutral employee who had not previously been involved in the matter. In a memorandum summarizing the oral presentation this designated official concluded:

> My not being familiar with all the reasoning behind the proposal to transfer Mr. Ketterer to Kansas City, I can only make recommendations on the basis of the information he gave me and the information which was sent to me by our Personnel Division prior to this conference. The alternatives I see available are:
>
> 1) Remove Mr. Ketterer from FCIC service.
>
> 2) Offer him a GS–13 position in NSO.
>
> 3) Leave him in his current GS–12 District Director position.
>
> My recommendation is to offer Mr. Ketterer the option of transferring to Kansas City in a GS–13 position or remain in

made the decision I was the only FCIC employee capable of filling said position at the National Service Office in Kansas City." No individual was produced by the agency representative, who in reply stated: "It is not a hearing, and witnesses will not be available for cross-examination." (Letter to appellant from Ray G. Hastings signing for Roy L. Alton dated April 27, 1979.)

[5] Undated written response of appellant.

> the GS–12 district director position. My recommendations are based on the fact that it appears Mr. Ketterer's services can be utilized in the field position at a GS–12 grade level or in the NSO at a GS–13. In view of this, I don't feel I can recommend Mr. Ketterer being separated from the FCIC service. Mr. Ketterer's services can certainly be utilized in the Office Services Branch at either a GS–12 or GS–13 grade level; however, I would question the feasibility of 'forcing' him to relocate.[6]

Stating that he had considered both this recommendation and the replies of appellant, an agency official notified him of his removal, concluding that "It is my finding that the reason stated in the letter of proposal is fully supported and warrants your removal to promote the efficiency of the service."[7] The removal was effective June 2, 1979. Appellant then appealed this determination to the Board's St. Louis Field Office and, after a hearing, the presiding official issued a decision sustaining the agency action. Appellant then filed a petition for review with the Board. By letter dated November 15, 1979 the Board provided the agency with the opportunity to respond to the petition. It has not done so.

II. PETITION FOR REVIEW

In his petition for review, appellant contends that the presiding official erred in his application of the law to the evidence. Specifically, he alleges that the presiding official did not require the agency to establish by a preponderance of the evidence that the removal would be for the efficiency of the service.

We agree. In a removal for cause following a refusal to accept a reassignment, the agency must prove by a preponderance of the evidence that the removal will promote the efficiency of the service. This necessarily includes a demonstration that the agency's decision to reassign the employee was a bona fide determination based on legitimate management considerations in the interests of the service. *McClelland* v. *Andrus,* 606 F.2d 1278, 1291 and note 61 (D.C. Cir. 1979).

In the analogous area of reductions in force (equally susceptible to misuse to effect an employee's separation), we have held that the agency's evidentiary burden includes proof that the RIF regulations were properly invoked due to appropriate management considerations. *Losure* v. *Interstate Commerce Commission,* 2 MSPB 361

[6] Memorandum to James D. Deal, Manager, from Ronald E. McAdoo, Assistant Director, Actuarial Division (May 11, 1979).

[7] Letter to the appellant from Roy L. Alton, Assistant Manager for Administrative Management (May 18, 1979). In this letter, Mr. Alton did not address the recommendations of Mr. McAdoo.

(1980). Regarding burdens of proof in such cases we there stated (at pp. 8-9, emphasis supplied):

> The agency may establish a prima facie case on this element of its decision by coming forward with evidence showing a RIF undertaken for any of the reasons specified in 5 C.F.R. § 351.201(a). If the employee presents no rebuttal evidence to challenge the bona fides of the agency's alleged reason for the RIF, the agency's initial evidence would normally suffice to meet also the agency's burden of persuasion on this element of its decision. *Once the agency makes out a prima facie case, the burden of going forward with rebuttal evidence shifts to the employee but the burden of persuasion (more precisely the risk of non-persuasion) never shifts from the agency.* Thus, where credible evidence, either in the employee's rebuttal presentation or in the agency's own admissions, is sufficient to cast doubt on the bona fides of the RIF, the agency may find it advisable to present additional evidence to meet its burden of persuasion. But whether the agency presents such additional evidence or not, the burden remains on the agency to persuade the Board by a preponderance of the evidence that the RIF regulations were in fact invoked for one of the legitimate management reasons specified in 5 C.F.R. § 351.201(a).

The same analysis applies to a removal upon a refusal to accept a reassignment. As part of its initial burden, the agency must come forward with evidence showing a legitimate management reason for the reassignment.[8] Together with evidence that the employee had adequate notice of the decision to transfer and that he refused to accept the reassigment, this would ordinarily be sufficient to establish a prima facie case.[9]

However, appellant in this case presented credible evidence which was more than sufficient to cast doubt on the existence of any legitimate management basis for the reassignment. Appellant's chief witness, a former agency official, testified that the

[8] Once it is established or unchallenged that a reassignment was properly ordered due to bona fide management considerations in the interest of promoting the efficiency of the service, in accordance with agency discretion under 5 CFR Part 335, this Board will not review the management considerations which underlie that exercise of agency discretion. *Cf. Griffin* v. *Department of Agriculture*, 2 MSPB 335 (1980). However, agency discretion to reassign may no more properly be invoked as a veil to effect an employee's separation than may a reduction in force. See *Losure* v. *Interstate Commerce Commission, supra.*

[9] The agency did just that when it explained that appellant had been selected for his knowledge of grain wheat and dry beans, which was believed to be more extensive than that of anyone else in the agency. However, this reason was effectively rebutted by appellant's witness who testified that there were many others in the agency familiar with grain wheat, and that appellant had little familiarity with dry beans.

purported basis for the reassignment was mistaken, adding that there was a greater need for appellant in Lincoln. The witness also corroborated appellant's evidence of recent efforts to remove appellant from the Lincoln regional office to enhance the promotion prospects of another employee. Finally, the witness testified that the Kansas City Office to which appellant was to be assigned was regarded by top agency officials as a place to send employees in order to encourage them to leave the agency by retirement or resignation. This evidence clearly rebutted the agency's prima facie case, making it incumbent upon the agency to come forward with further evidence relating the reassignment to the efficiency of the service.[10] Suffice it to say that the agency failed to present any such evidence.[11]

Accordingly, because we find that the agency failed to meet its burden by a preponderance of the evidence, the initial decision is REVERSED. The agency is hereby ORDERED to cancel appellant's reassignment to Kansas City and to cancel appellant's removal, and to furnish evidence of compliance to the St. Louis Field Office within ten (10) days of receipt of this decision.

RUTH T. PROKOP.
ERSA H. POSTON.
RONALD P. WERTHEIM.

July 2, 1980.

[10] The initial decision contains a thorough discussion of the evidence presented. The presiding official erred, however, in allocating to appellant the burden of proving that the reassignment was not a legitimate exercise of agency discretion. Furthermore, in light of the agency's failure to rebut appellant's uncontradicted evidence of improper agency motivation, the record warranted a finding of facts as alleged by appellant. Finally, the presiding official should have recognized that the facts developing at the hearing pointed strongly toward the commission of prohibited personnel practices, and should have explored these issues at the hearing.

[11] The agency's representative and sole witness at the hearing was the personnel specialist who wrote the removal letter. This witness had no firsthand knowledge of the reasons for the proposed reassignment, and no information at all with which to rebut the allegations of improper motivation. The agency's lack of preparation is remarkable when it is considered that appellant raised these serious allegations well in advance of the hearing.

UNITED STATES OF AMERICA

BEFORE THE MERIT SYSTEMS PROTECTION BOARD

St. Louis Field Office

JACK KETTERER, *Appellant*

v.

U.S. DEPARTMENT OF AGRICULTURE
FEDERAL CROP INSURANCE CORPORATION, *Agency*

Decision Number: SL075299024

Decided on: September 21, 1979

INTRODUCTION

Jack Ketterer appealed the action taken by the agency whereby he was removed from his position of Crop Insurance Specialist, effective June 2, 1979, because of failure to accept reassignment.

JURISDICTION

Appellant's removal is appealable to the Board pursuant to 5 U.S.C. 7513(d).

Under 5 U.S.C. 7701(d)(1)(B), the agency action under consideration must be sustained by the Board if it is supported by a preponderance of the evidence, unless the appellant shows that the provisions of 5 U.S.C. 7701(c)(2) are applicable.

CASE ANALYSIS

The portion of the notice of proposed removal which states the reason for the action is quoted below in its entirety:

> On February 26, 1979, I advised you of your reassignment to the Crop Insurance Specialist position in Kansas City to be effective April 8, 1979. We are in receipt of your letter of March 28, 1979, declining this offer, therefore, the specific reason for this action is based on this declination. Enclosed is a copy of the material on which the proposed removal is based.

It is undisputed that appellant was notified of his transfer from Lincoln, Nebraska, to Kansas City, Missouri, by letter dated February 26, 1979; that appellant declined this transfer by letter dated March 28, 1979; and that appellant never reported to Kansas City to assume his duties. Based on the foregoing, the specification is sustained.

On appeal, appellant questions the propriety of the agency's decision to transfer him.

5 C.F.R. 335.102 delegates to agencies the power to reassign employees. Furthermore, Federal Personnel Manual Chapter 351, Subchapter 1-2c, provides that:

> Planning the work program and organizing the work force to accomplish agency objectives within available resources are management responsibilities. Only the agency can decide what positions are required, where they are to be located, and when they are to be filled, abolished, or vacated.

Thus, agencies are granted broad authority to make personnel reassignments. A supervisor's exercise of the discretion to order reassignment may be challenged by formal grievance (see Federal Personnel Manual, Chapter 771, Subchapter 1-5) or by informal discussion with higher level management. Also, in appropriate circumstances, the question may be entertained by the Board's Special Counsel. However, Civil Service regulations place no specific limit on the agency's discretion to transfer employees and there is no provision for final administrative review of such matters outside the agency.

The basic legitimacy of the "discretionary sanction" by which an agency may separate an employee who refuses a position change which the agency has determined would serve the best interest of the service is well settled. (See *Comberiate* v. *United States*, 203 Ct. Cl. 285). A separation resulting from an employee's refusal to relocate may be set aside on appeal in those situations where the apparent exercise of an agency's discretion is actually a subterfuge used to place the employee in a position where his removal from the agency could be secured. (See *Motto* v. *General Services Administration*, 335 F. Supp. 694 (ED La. 1971).) However, an agency need not prove the wisdom of its assignment decision in order to justify a subsequent adverse action of this type. In this absence of a showing of bad faith, the agency's reasons for exercising its discretion in a particular way does not affect the propriety of an adverse action based on the employee's failure to perform assigned duties. Bad faith and abuse of discretion will not be inferred merely from the presence of personal factors which go beyond workload needs and the employee's particular job skills. For example, in the case of *Burton* v. *United States*, 186 Ct. Cl. 172 (1968), removal of an employee who did not accept a transfer was affirmed despite the fact that a "lack of rapport" between the employee and his superiors was undisputedly a factor in the decision to select that particular employee for geographic reassignment.

Based on the evidence which will be reviewed below, I find that appellant has failed to show that the agency was motivated by a desire to create a basis for securing his removal from the service when it selected him for transfer.

Mr. Roy L. Alton, the Assistant Manager for Administrative Management in the agency's national office, testified regarding the decision to transfer appellant. He stated that a reorganization in 1977 had centralized several national operations in a National Service Office located in Kansas City. Vacancies had occurred through normal employee turnover and appellant had been selected to fill a position in the Office Services Branch Group of the National Service Office. Mr. Alton stated that appellant was the best person available for the position in question and had received an informal offer of repromotion to GS–13 if he would accept the transfer. However, Mr. Alton had not been deeply involved in the selection process and was able to give few details regarding the need for appellant's particular skills. He did state that an individual with expertise in as many specialties as possible on the subject of grain wheat was needed. However, he agreed with appellant's assertion that at least 150 other people in the agency have expertise on the same general subject matter.

Mr. Alton also testified that the agency had a "tight ceiling" for personnel and that appellant's former position in Lincoln had been abolished with its duties being absorbed by the other District Directors. It is not clear whether the opportunity to eliminate a District Director position was a factor in appellant's selection. However, it is noted that an agency may properly use reassignment rather than reduction-in-force action in order to vacate a surplus position which it wishes to abolish.

Mr. Edward J. Finigan, a former agency employee, testified on appellant's behalf. Mr. Finigan was the agency's Nebraska State Director from 1962 to 1971 and has had informal dealings with the agency since that time. His testimony supports a finding that a recent State Director, Mr. Lloyd Scheide, and the Assistant State Director, Mr. James Overbeck, wished to transfer appellant from the Lincoln office. Mr. Finigan felt that "a series of events, particularly the promotion (of appellant) to the position of Claims Director in Nebraska" caused Mr. Overbeck to dislike appellant. The witness stated that Mr. Overbeck asked him "many times" if he thought that Mr. Overbeck could "get by with" transferring appellant out of the state. Also, Mr. Scheide called "on one or two occasions" regarding the possibility of transferring appellant. *However, Mr. Alton testified that the transfer decision was made* by James Deal, the agency's Manager in Washington. There is no direct evidence that the personal preferences of Mr. Scheide or Mr. Overbeck played a role in this decision.

Mr. Finigan speculated that appellant's transfer might have been desired in order to improve the promotion opportunities of Mr. Overbeck. Mr. Finigan testified that when Mr. Scheide came to Lincoln it was expected that he would stay there for approximately one

year. He stated that Mr. Deal and Mr. Scheide had told him that this was done to give Mr. Overbeck time to accumulate time at the GS–13 level so that he could be eligible to compete for the State Director position. It is undisputed that Mr. Scheide was transferred to Kansas City after appellant's removal and that recruitment to fill the position was underway while this appeal was pending. It is suggested that appellant's absence from the Lincoln office would make it easier to justify the selection of Mr. Overbeck to fill the State Director position. Apparently, Mr. Deal would make the selection to fill the State Director vacancy. Assuming in argument that he preferred Mr. Overbeck for this promotion, I am not persuaded that he would have felt the need to transfer appellant merely to strengthen his justification for selecting Mr. Overbeck. Selecting officials have reasonably broad discretion to exercise judgment in choosing among qualified candidates for vacant positions. It is noted that Mr. Overbeck held a position at the GS–13 level, while appellant, despite his years of experience at GS–13, occupied only a GS–12 position at the time in question. Also, Mr. Overbeck had one year of experience as Assistant State Director. Appellant is not shown to have had experience in his particular position. Mr. Finigan's testimony supports a finding that he had personally considered appellant to be the superior of these two employees during his own period as State Director, but there is no evidence of actual performance—related information which would cause the selection of Mr. Overbeck rather than appellant to be suspect. While it is possible that appellant was actually the superior candidate, the factors which were reviewed above show that the selecting official would have little difficulty justifying Mr. Overbeck's selection whether or not appellant was actually assigned to the Lincoln office at the time the vacancy was filled.

Beyond the unpersuasive speculation regarding efforts to enhance Mr. Overbeck's opportunities for promotion, appellant does little to suggest reasons why the agency might have unjustifiably wished to transfer him. In his original petition for appeal, appellant stated that "management" had indicated that the transfer was needed because he was difficult to get along with. However, he did not elaborate on his contention or offer any specific evidence that agency management actually held such an opinion. Even if it were established that the agency considered appellant to be a troublesome employee and had determined that assignment to Kansas City would reduce or eliminate the problem, the transfer would not, thereby, be shown to be improper. Reassignment of such an employee to a new work environment would be a legitimate exercise of agency discretion. Based on the appeal record, it would be speculative to even conclude that a "lack of rapport" such as that reflected in *Burton* v. *U.S.*, *supra*, existed be-

tween appellant and his superiors. There is certainly no basis for a finding that the desire to transfer appellant should also be considered a desire to secure his removal from the agency's employ.

The record contains reference to a group of employees known as the "bone pile" who were located in the Office Services Branch at the Kansas City office. The "bone pile" was allegedly a concentration of unproductive employees who were given little or no significant work to perform. Mr. Finigan testified that Mr. Deal had advised him shortly before Mr. Deal assumed the duties of the agency's Manager that he intended to establish such a group in the hope that the employees who were assigned thereto would ultimately choose to resign. It is appellant's belief that he would have been destined for the "bone pile" had he reported for duty in Kansas City. This belief is based on the fact that appellant was placed in close physical proximity to those individuals during a three-week temporary assignment to Kansas City. Appellant also stated that an agency official in Washington had informed him that he was getting the "shit trip" when he inquired why he was being forced to transfer to Kansas City. However, it is clear that the Office Services Branch had other employees in addition to those who were considered to be the "bone pile," and appellant agrees that he was given meaningful work to perform during his detail to the Kansas City office. More importantly, there is inadequate evidence concerning why the agency might want to shunt appellant into a position where he could make no meaningful contribution to the agency's mission and where he might ultimately choose to resign. Neither the speculation regarding Mr. Overbeck's promotion nor appellant's brief reference to the possibility that he was considered a troublesome employee offer significant support for the proposition that the agency actually harbored such dark motives regarding appellant.

An additional matter raised by appellant concerns the circumstances surrounding his voluntary change to lower grade from GS–13 to GS–12 in February, 1978. This change to lower grade allowed appellant to avoid an earlier transfer to Kansas City and to retain his Lincoln duty station. Mr. Alton testified that the earlier transfer had been a result of the reorganization which established the centralized office in Kansas City. At that time appellant held the position of Contract Service Chief, GS–13. A number of such positions throughout the nation were identified for transfer to Kansas City at that time. While it is not entirely clear from the record, it appears that the 1978 action was a transfer of the duties of the Contract Service Chief position rather than a personal transfer of appellant. After some effort by appellant, a District Director position in Lincoln was made available to him. Mr. Alton testified that this was a situation in which appellant's services could be used

either in the Contract Service position in Kansas City or in the District Director position in Lincoln. Therefore, the agency was able to accommodate appellant's personal desire to remain in Lincoln. Appellant refers to the 1978 matter as involving an "agreement" to allow him to remain in the Lincoln duty station. However, his testimony regarding the specific circumstances of the change to lower grade decision fails to support a finding that an enforceable agreement to permanently leave appellant in Lincoln existed. Appellant testified that immediately after he signed the request for change to lower grade he inquired of Mr. Scheide if that would end the matter of the transfer to Kansas City. He received an affirmative reply (Tr. p. 113). There is no evidence that the change to lower grade was the result of negotiations between appellant and Mr. Scheide in which appellant relinquished his right to retain his GS–13 level position (unless subject to adverse action or reduction-in-force action) in exchange for the agency's agreement to relinquish its right to effect geographic reassignment. I find no specific or implied contract arising from the 1978 change to lower grade. Rather, as Mr. Alton stated, this seems to have been simply a situation in which the agency could use appellant's services at either location and was willing to accommodate appellant's desire by assigning him to the GS–12 District Director position in Lincoln.

My review of the evidence has failed to show that the agency was motivated by a desire to secure appellant's removal when it selected him for reassignment or that other factors existed which made the reassignment decision such an abuse of discretion that appellant was relieved of the responsibility to perform the duties which the agency assigned to him. I find that appellant has failed to show that the reassignment of his position was not a legitimate exercise of agency discretion.

In view of appellant's extended refusal to report to duty in his new position, the penalty of removal was justified.

DECISION

I find that the specification was supported by a preponderance of the evidence, that there was no impropriety in the agency's action which would warrant appellant's refusal to transfer, and that there is no basis on which to disturb the agency's selection of the penalty of removal. Therefore, the action of the agency is affirmed.

NOTICE

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on October 26, 1979, unless a petition for review is filed with the Board within thirty-five (35) calendar days after the date of this decision.

Any party to this appeal or the Director of the Office of Personnel Management may file a petition for review of this decision with the Merit Systems Protection Board. The Director may request review *only if he/she is of the opinion that the decision is erroneous and* will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office (5 U.S.C. 7701(e)(2)). The petition must identify specifically the exception taken to this decision, cite the basis for the exception, and refer to applicable law, rule, or regulations.

The petition for review must be filed with the Secretary to the Merit Systems Protection Board, Washington, D.C. 20419, no later than thirty-five (35) calendar days after the date of this decision.

The Board may grant a petition for review when a party submits written argument and supporting documentation which tend to show that:

(a) New and material evidence is available that, despite due diligence, was not available when the record was closed; or

(b) The decision of the presiding official is based on an erroneous interpretation of statute or regulation.

Under 5 U.S.C. 7703(b)(1) the appellant may petition the United States Court of Appeals for the appropriate circuit or the United States Court of Claims to review any *final* decision of the Board provided the petition is filed no more than thirty (30) calendar days after receipt.

For the Board:

JAMES H. FREET,
Presiding Official.