UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JEAN HOOVER LOSURE
v.
INTERSTATE COMMERCE COMMISSION

Docket No.
DC035199008

OPINION AND ORDER

Petitioner was employed by the Interstate Commerce Commission (ICC) in the position of Congressional Relations Representative, GS-13, until February 24, 1979, when she was separated by reduction in force (RIF) procedures.[1] She appealed her separation to this Board's Washington, D.C. Field Office, which sustained the agency action in an initial decision issued July 13, 1979. In a petition for review, Ms. Losure contends that the presiding official's decision was inconsistent with his findings of fact, that the agency's bad faith could be inferred from the circumstantial evidence, and that the presiding official erred in finding that improper motivation for a RIF action can only be proved by evidence of an open expression of the agency's dissatisfaction with the employee.

Because the case raises significant issues concerning proper use of RIF procedures and the burden of proof, the petition for review is GRANTED. Based on that review, the initial decision is reversed and petitioner's separation is canceled for the reasons stated below.

I. BACKGROUND

The specific facts as found by the presiding official and supported by the record are relatively clear. Prior to the events here pertinent, the congressional relations function at the ICC was the responsibility of the agency's Secretary with the aid of a GS-15 Assistant Congressional Relations Officer, Ms. Losure at the GS-13 level, and a GS-8 staff assistant. In 1977 the Secretary and the GS-15 Assistant were removed for alleged misconduct.[2] From that time until mid-1978, the agency contemplated restructuring the

[1] Petitioner was a career employee in the competitive service and also was a preference eligible as a veterans widow, 5 U.S.C. 2108(3)(D).

[2] The record includes no suggestion that petitioner was involved in any of the alleged misconduct. In its notice of petitioner's separation, the agency expressly stated that "Your service and performance have been quite satisfactory with this Commission, and this action in no way is considered to be adverse to you."

Congressional Relations Office. Throughout that period, petitioner and the GS-8 staff assistant who remained with her in the office were moved to another location and physically as well as functionally isolated from the rest of the agency, given no guidance or assistance, and petitioner was for the most part given only clerical duties inconsistent with her GS-13 position. In June 1978, a new Congressional Relations Officer entered on duty, at the GS-15 level, reporting directly to the ICC Chairman.

As part of the contemplated restructuring, consideration had been given earlier in 1978 to the establishment of a GS-14 position as Assistant Congressional Relations Officer, but the agency's Performance Review Office had conducted an analysis of the proposed position and had advised the ICC Chairman that the office workload did not justify such an additional position (Transcript, p. 380). Nevertheless, the agency established the position and filled it in July 1978. Ms. Losure had applied for the position but was not selected. There is little dispute in the record that almost all of the duties Ms. Losure had previously performed were reassigned to the new GS-14 position. A comparison of the position descriptions for Ms. Losure's position and the GS-14 position reveals that the two are essentially the same.[3] Thereafter, petitioner was informed by RIF notice that her position would be abolished. She was offered a GS-8 position, but declined and was separated.

Ms. Losure alleged that the agency was motivated in its action by reasons personal to her, i.e., association with the office's operation under the former supervisors who had been dismissed by the ICC for alleged wrongdoing. The presiding official found that since there was no open expression of dissatisfaction with Ms. Losure personally or with her performance, the agency's action must be sustained as not having been taken for reasons personal to her. The key findings and reasoning of the presiding official were stated as follows (2 MSPB 367, 371 (1979)):

> The record in this case contains evidence that the agency took, essentially, three (3) actions with regard to the appellant: (1)

[3] With respect to establishment of the GS-14 position, the presiding official found (2 MSPB at 370): "The reasons for the agency's action in this regard were explored, through testimony, at the hearing in this case and no clear answers were obtained, even though those testifying were the officials directly responsible for the action. The Chairman of the ICC stated that the Federal/State liaison function was the main reason for justifying establishment of the GS-14 position in the Congressional Relations Office (O'Neal, Tr. at 401). Yet, on further cross examination he stated that the GS-14 was not created to handle Federal/State liaison (O'Neal, Tr. at 411). The person selected to fill the GS-14 position testified that she did not perform any Federal/State liaison functions and had no responsibilities for them (Forti, Tr. at 488). A comparison of the position descriptions for the appellant's position and the GS-14 (Agency Exhibit 7 and 8) reveals that the two are essentially the same. These positions were certified as being correct by Mr. Hatton on June 29, 1978."

they isolated her and a fellow employee of the Congressional Relations Office following the dismissal of their former supervisors; (2) they created a position in the office nearly identical to her position and gave the incumbent of that position duties she formerly performed; and (3) they abolished her position. *The motives for these actions, which are really at the heart of the matter before the Board, are not clearly visable [sic].* There is no open expression, on the part of any agency official, of dissatisfaction with the appellant personally, or with her performance, however, *what does come across in the testimony and the documentary evidence is the desire by the agency to shed the stigma of the dismissal of its former Congressional Relations Officer and his deputy and to create a credible Congressional Relations program.* For, as Chairman O'Neal testified, he was concerned with relations between the ICC and the Congress and he wanted to establish a viable Congressional Relations Office to obtain that end (O'Neal, Tr. at 376-77). I find that the preponderance of the evidence of record establishes that this was the primary motive for the agency's action, which led ultimately to the appellant's separation. *I do not find that the appellant has met her burden of showing that management's actions were grounded on improper motives, which were personal to her.* [Emphasis supplied].

II. DISCUSSION

The Board finds the reasoning of the initial decision to be erroneous both in interpreting the pertinent RIF regulation and in allocating the burden of proof.

A. Justification for RIF

The permissible reasons justifying a reduction in force are set out at 5 C.F.R. § 351.201(a) as "lack of work, shortage of funds, reorganization, reclassification due to change in duties, or the exercise of reemployment rights or restoration rights." These regulatory terms have legislative effect, giving meaning to the statutory expression "reduction in force" as provided in 5 U.S.C. § 3502(a). The term "reorganization,"[4] while broad enough to cover a multitude of legitimate management considerations, is not a magic word whose incantation can justify use of RIF actions to circumvent an employee's procedural rights. An agency may not use RIF procedures to bypass the requirements of Chapter 75, title 5. *Fitzgerald* v. *Hampton,* 467 F.2d 755 (D.C. Cir. 1972).

[4] 5 C.F.R. § 351.203(g) [now 5 C.F.R. § 351.203(f)] defines "reorganization" as "the planned elimination, addition, or redistribution of functions or duties in an organization."

Neither the desire to "shed the stigma" of former officials nor the desire to "create a credible Congressional Relations program" is a permissible reason to separate petitioner by RIF procedures. At best these reasons relate to petitioner's performance and are therefore personal to her. At worst they amount to guilt by association.

An "open expression of dissatisfaction" is not necessary to a finding of improper agency motivation. Even if personal animus were required, it might be inferred here from circumstantial evidence such as the agency's "isolation" of petitioner followed by the sequence of personnel actions which amounted to little more than creating a new position, and then asserting that in consequence she was no longer needed. This bureaucratic version of the old shell game, in which the victim ends up with no job because the duties have been slipped under a new shell (position) but nothing of substance has changed, may alone be enough to raise an inference of improper motivation—at least when combined with other circumstances such as those present here.

In *Ritter* v. *Strauss*, 261 F.2d 767 (D.C. Cir. 1958), there was no personal animus against the plaintiff, who was separated to accommodate a former employee. The agency rehired the former employee, rendering plaintiff's position superfluous. Plaintiff was then separated by RIF procedures, and the former employee promoted to the position which plaintiff had held in an acting capacity. The court in overturning the agency action held that reduction in force procedures were only applicable where the RIF was due to "lack of work, shortage of funds, reorganization or exercise of regulatory reassignment or reemployment rights." 261 F.2d at 772.

The key question is whether "the alleged reorganization was only a veil for [petitioner's] summary discharge." *Keener* v. *United States*, 165 Ct. Cl. 334, 338 (1964). While agencies have discretion in the organization of their operations, *Wilmot* v. *United States*, 205 Ct. Cl. 666 (1974), the Board will not allow the circumvention of adverse action procedures where the "reorganization" has no substance and is in reality a pretext for summary removal. As the court of appeals held in *Fitzgerald, supra:*

> Were we to look no further than the stated reason for an employee's separation, not only could an agency cavalierly discharge preference eligibles under the guise of a 'reduction in force' but under that type of action it could also deprive them of all adverse action procedural rights to which preference eligibles are entitled.

467 F.2d at 758-59.

In this case it is clear that what transpired at the ICC, so far as petitioner's position is concerned, was a reorganization only on paper. Any shortage of work was a shortage caused by the agency's

hiring of a new employee to perform petitioner's duties. The alleged reorganization thus appears to be merely a pretext to rid the Congressional Relations Office of an employee whose association with the office's operation under the discredited former supervisors was thought to impair the establishment of a viable congressional relations program. As such the RIF action was invalid, being motivated by reasons personal to the petitioner. The fact that there was no dissatisfaction with petitioner "personally" or with her performance, but only with her involuntary association with her then supervisors, renders all the more improper the agency's resort to summary procedures in which no charges had to be proved against her.

This is not to say that any agency official acted with subjective bad faith. The agency may well have believed, honestly and pragmatically, that its congressional relations program would more successfully recover "credibility" if carried out by personnel who were not vulnerable to unfounded prejudices due to innocent association with the discredited former officials. But the agency had a duty to protect merit principles, enacted into law by the very Congress with which the agency sought good relations, and if necessary to maintain those principles in the face of any such unfounded prejudices. Bowing to such prejudices by separating an untainted and admittedly satisfactory employee whose duties still required performance within the agency cannot be deemed a proper motivation for resort to RIF procedures.

B. Burden of Proof

In allocating the burden of proof to petitioner to establish improper agency motivation, the presiding official misapplied 5 U.S.C. § 7701(c)(1)(B). Under that provision, the burden is on the agency to support its "decision" by a preponderance of the evidence. The application of the regulations set out in 5 C.F.R. Part 351 determines the nature of a covered employee's entitlement under 5 U.S.C. § 3502(a) to continued employment. It is the determination of an employee's entitlement by application of those regulations which is appealable to the Board. 5 C.F.R. § 351.901[5] This determination constitutes the agency "decision" which is to be sustained only if supported by a preponderance of the evidence, § 7701(c)(1)(B). As such, that decision necessarily embraces the proper invocation of RIF regulations under 5 C.F.R. § 351.201(a) as

[5] Proper determination of an employee's entitlement under the RIF regulations is thus a substantive right of the employee, not merely a procedural requirement subject to the harmful error standard of § 7701(c)(2)(A). Subpart H of Part 351 sets forth the procedure which agencies must follow in carrying out a RIF, subject to the harmful error standard. With respect to the order of proof as distinct from the burden of proof, see note 6, *infra*.

well as the specific application of those regulations to the individual employee. The agency's evidentiary burden, therefore, includes proof that the RIF regulations were properly invoked due to *management considerations of the character appropriately committed* to agency discretion.

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.[6] 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)[7]

On the facts found by the presiding official and supported by the record before us, the agency has not carried that burden in this case.

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[6] This burden on the agency reflects appropriately the fact that the agency is the proponent of the action at issue and the agency possesses or has readier access to the evidence relating to the reasons for the RIF. Moreover, on controlling the course of the hearing under 5 C.F.R. § 1201.41(b), the presiding official has discretion, for example at a prehearing conference and/or by regulating the order of proof at the hearing, to require the appellant to identify the alleged impropriety in the agency's invocation or application of the RIF regulations with sufficient specificity to enable the agency to address the contested matters in its presentation of evidence. Such regulation of the order of proof does not affect the burden of persuasion. This discretion should normally be exercised when the petition for appeal does not adequately disclose the specific grounds on which the RIF action is challenged.

[7] None of the cases relied upon in the agency's response to the petition for review, or cited in the initial decision, supports a contention that the employee must prove improper agency motivation as an affirmative defense before the Board. While language referring to the "presumption" of good faith by public officials is frequently used by the courts, all of the cases to which we have been referred were decided in the context of an employee's burden as appellant or plaintiff upon *judicial* review to show that the action complained of was arbitrary, capricious, an abuse of discretion, or was not supported by substantial evidence. *See Travis* v. *United States*, 199 Ct. Cl. 67, 70 (1972) (reduction in force); *Horne* v. *United States*, 419 F.2d 416, 419 (Ct. Cl. 1969) (removal); *Keener* v. *United States*, 165 Ct. Cl. 334, 338 (1964) (reduction in force); *Daub* v. *United States*, 223 F. Supp. 609, 612 (E.D.N.Y. 1963) (reduction in

CONCLUSION

We find, therefore, that the agency's decision to separate Ms. Losure was not authorized by 5 C.F.R. Part 351, and that she is entitled to cancellation of her separation. This conclusion makes it unnecessary for us to consider petitioner's further contentions relating to alleged political partisanship.

Accordingly, it is ordered that:

1. The initial decision dated July 13, 1979, is reversed;
2. The Interstate Commerce Commission is directed to cancel the personnel action separating Jean Hoover Losure;
3. Within ten (10) days of the date hereof, the Interstate Commerce Commission shall file with the Board's Secretary written verification of the Commission's compliance with paragraph (2) of this order.

For the Board:

RONALD P. WERTHEIM.

June 2, 1980.

UNITED STATES OF AMERICA

BEFORE THE MERIT SYSTEMS PROTECTION BOARD

In the matter of
JEAN HOOVER LOSURE
v.
INTERSTATE COMMERCE COMMISSION

Decision Number: DC035199008

Date: July 13, 1979

INTRODUCTION

On March 8, 1979, Ms. Jean Hoover Losure appealed from the action of the Interstate Commerce Commission, Washington, D.C.

force); *Preble* v. *United States*, 150 Ct. Cl. 39, 47 (1960) (removal); *Adams* v. *Humphrey*, 232 F.2d 40, 41 (D.C. Cir. 1955) (abolition of apprenticeships); *Knotts* v. *United States*, 121 F. Supp. 630, 631 (Ct. Cl. 1954) (removal). The reference in *Keener*, *supra*, to "the special burden resting on an employee who charges that a managerial decision, fair on its face, was rendered for improper motives," 165 Ct. Cl. at 339, is fully consistent with our holding that once the agency has met its initial burden of showing a facially proper RIF action the employee has the burden of going forward with rebuttal evidence placing in issue the bona fides of the agency's alleged reason for the RIF, but that the burden of persuasion remains upon the agency to sustain its action upon the ground stated. Furthermore, 5 USC § 7701(c)(1), as amended by the Civil Service Reform Act, now expressly places the burden upon the agency to support its decision by the requisite standard of proof.

separating her from the position of Congressional Relations Representative, by reduction-in-force procedures, effective February 24, 1979.

JURISDICTION

Since this action was commenced in the Interstate Commerce Commission subsequent to January 10, 1979, it is governed by the provisions of the Civil Service Reform Act of 1978, 92 Stat. 1224.

The appellant is an employee of the Federal Government who was released from her competitive level by the application of reduction-in-force procedures, and is therefore entitled to appeal her separation to the Merit Systems Protection Board under the provisions of 5 C.F.R. § 351.901.

ANALYSIS AND FINDINGS

By reduction-in-force notice dated January 22, 1979, the appellant was informed that her position, Congressional Relations Representative, GS-13, would be abolished, effective February 24, 1979. In lieu of separation appellant was offered the position of Congressional Relations Assistant, GS-8. Appellant declined the offer of assignment and was separated.

On appeal to the Board, appellant attacks the bona fides of the reduction-in-force action and contends that her separation was based on prohibited personnel practices, in that the action was personal to her and was taken for the purpose of selecting another to take her place in the agency. Appellant also contends that the motives behind the separation action were reprisal for her association with and testimony in behalf of her former supervisor in an adverse action proceeding against him and for partisan political reasons.

The agency's position is that appellant's separation under reduction-in-force procedures was the result of the abolishment of her position, because the duties of that position were no longer required, and her rejection of their offer of reassignment. The agency denies any motives for this action, other than necessary management considerations.

The reduction-in-force system as provided for in statute and regulation (5 U.S.C. § 3501; 5 C.F.R. § 351.201) is a system for releasing employees from their competitive levels when their release is required because of lack of work, shortage of funds, reorganization, reclassification due to change in duties, or the exercise of reemployment or restoration rights. The system is predicated upon the concept of competition for retention based upon tenure, veterans preference, length of service and performance rating.

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 where they are to be filled, abolished or vacated. The agency determines when there is a surplus of employees at a particular location in a particular kind of work. A surplus of employees in any part of an agency requires the agency to determine whether the employees will be assigned to vacant positions, be adversely affected for reasons related to performance or conduct or compete in reduction in force. These are management responsibilities and the management determinations regarding these responsibilities are not ordinarily subject to review in a reduction-in-force appeal. *Bielec* v. *United States*, 456 F.2d 690, 197 Ct. Cl. 550 (1972); *Gibson* v. *United States*, 176 Ct. Cl. 102 (1966).

However, inherent in the reduction-in-force system and one of its fundamental precepts is that it be used only for reasons that are non-personal to the employees affected. The reduction-in-force system must not be used to remove inadequate or unsatisfactory employees in lieu of following adverse action procedures set forth in 5 U.S.C. §§ 7511-7514 and 5 C.F.R. § 752.301. Thus, an allegation that the reduction in force was a subterfuge to conceal an agency removal action taken without following the adverse action procedures, when supported by a sufficient showing that the action may have been based upon an intention to separate the employee rather than upon a non-personal reason for reducing the force, goes directly to the question of the bona fides of the reduction in force and will be reviewed on appeal. The appellant in a reduction-in-force appeal has the burden of making such a showing. *Daub* v. *United States*, 223 F. Supp. 609 (E.D.N.Y. 1963), *Keener* v. *United States*, 165 Ct. Cl. 334 (1964).

Evidence presented by the appellant, primarily the testimony of herself and Ms. M. Suzette Waddington, shows that the Congressional Relations Office (CRO) underwent a drastic change beginning in June of 1977. The Congressional Relations Officer and his deputy, appellant's supervisors, were dismissed for alleged acts of misconduct and the appellant and Ms. Waddington, a GS-8 Congressional Relations Assistant, were the only ones left in that office. The testimony shows that this situation continued until the selection of Mr. Bruce Hatton as the Congressional Relations Officer in June of 1978. Both Ms. Waddington and the appellant stated that after the dismissals they were isolated from the rest of the agency and were given no guidance or assistance; that they were moved into offices which were away from the main functions of the Commission; and that appellant's duties were mostly clerical, although she was the only professional in the office.

When Mr. Hatton was hired he immediately recruited and hired a GS-14 assistant. Ms. Losure contends that the establishment and filling of the GS-14 position were preludes to the abolishment of her position. She claims that management knew and in fact planned that the GS-14 position would take over the duties she performed, leaving her with nothing to do and resulting in the abolishment of her position.

The record shows that during the period from the dismissal of the former Congressional Relations Officer and his deputy, in 1977, until June of 1978, the agency contemplated a restructuring of the Congressional Relations Office. Agency Exhibit #30, a memorandum to the Chairman of the ICC, dated April 27, 1978, recommends the creation of the GS-14, Assistant Congressional Relations Officer position. The agency continued to study organization and responsibilities of the Congressional Relations Office, and Agency Exhibit #27, a memorandum from the Chief, Section of Performance Review to the Managing Director, dated June 14, 1978, recommends that the establishment of the position of Assistant Congressional Relations Officer, GS-14 be held in abeyance "... until the workload is sufficient to justify the position, or additional duties are assigned (i.e. Federal/State liaison)." Thus, it is very clear that in June of 1978, the agency was aware that the GS-14 position was not warranted in the Congressional Relations Office. However, the agency went ahead and established the position and filled it in July of 1978.

The reasons for the agency's action in this regard were explored, through testimony, at the hearing in this case and no clear answers were obtained, even though those testifying were the officials directly responsible for the action. The Chairman of the ICC stated that the Federal/State liaison function was the main reason for justifying establishment of the GS-14 position in the Congressional Relations Office (O'Neal, Tr. at 401). Yet, on further cross examination he stated that the GS-14 was not created to handle Federal/State liason (O'Neal, Tr. at 411). The person selected to fill the GS-14 position testified that she did not perform any Federal/State liaison functions and had no responsibilities for them (Forti, Tr. at 488). A comparison of the position descriptions for the appellant's position and the GS-14 (Agency Exhibit 7 and 8) reveals that the two are essentially the same. These positions were certified as being correct by Mr. Hatton on June 29, 1978.

Agency Exhibit 17, a memorandum from Mr. Hatton to the agency personnel director, dated January 5, 1979, shows that after six (6) months under the new office organization the appellant was not functioning at the GS-13 level. Hatton testified that appellant was not given duties under her position description, but that he gave her what he had to give (Hatton, Tr. at 321-26). What, in effect,

Hatton was saying was that the Congressional Relations Office could not support both Ms. Losure's position and the GS-14 position, a fact known to the agency in June of 1978, when the GS-14 position was created.

The record in this case contains evidence that the agency took, essentially, three (3) actions with regard to the appellant: (1) they isolated her and a fellow employee of the Congressional Relations Office following the dismissal of their former supervisors; (2) they created a position in her office nearly identical to her position and gave the incumbent of that position duties she formerly performed; and (3) they abolished her position. The motives for these actions, which are really at the heart of the matter before the Board, are not clearly visable. There is no open expression, on the part of any agency official, of dissatisfaction with the appellant personally, or with her performance, however, what does come across in the testimony and the documentary evidence is the desire by the agency to shed the stigma of the dismissal of its former Congressional Relations Officer and his deputy and to create a credible Congressional Relations program. For, as Chairman O'Neal testified, he was concerned with relations between the ICC and the Congress and he wanted to establish a viable Congressional Relations Office to obtain that end (O'Neal, Tr. at 376-77). I find that the preponderance of the evidence of record establishes that this was the primary motive for the agency's action, which led ultimately to the appellant's separation. I do not find that the appellant has met her burden of showing that management's actions were grounded on improper motives, which were personal to her. *Knotts* v. *United States*, 128 Ct. Cl. 492, 121 F. Supp. 631 (1954); *Preble* v. *United States*, 150 Ct. Cl. 46 (1960).

The appellant has alleged that the reasons for the agency's actions were political in that they wanted to remove her to make way for a person whose partisan political affiliation was in line with the current administration. While she presented evidence that she is a Republican and the person selected to fill the GS-14 position is a Democrat she has not offered persuasive evidence that this was the reason for creation of that position in the first instance. I make no such finding with regard to the selection action involving the GS-14 position, which I consider to be a separate matter.

Appellant has also alleged that the agency's actions were motivated by her prior association with the former Congressional Relations Officer and his deputy. While her isolation within the agency following the dismissal of those two officials may have been motivated by a desire to keep a low profile with regard to the Congressional Relations function, I find no evidence that the later actions establishing and filling the GS-14 position were so motivated.

The agency did know or had reason to believe that the Congressional Relations Office could not support a GS-13 and a GS-14, but even if they decided to replace the one position with the other, such was a management prerogative and absent a showing, by the appellant, of improper motivation was permissable. *Adams* v. *Humphrey,* 232 F.2d. 40, 41 (C.A.D.C. 1955).

CONCLUSION

I conclude, based on the foregoing, that the appellant was separated for bona fide reduction-in-force reasons, 5 U.S.C. 3501 3501, 5 C.F.R. 351.201.

DECISION

The decision of the agency separating the appellant be reduction in force, effective February 24, 1979, is hereby affirmed.

This decision is an initial decison and will become a final decision of the Merit Systems Protection Board on August 17, 1979 unless a petition for review is filed with the Board within thirty-five (35) calendar days after the petitioner's receipt 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 petition must identify specifically the exception taken to this decision, cite the basis for exception, and refer to applicable law, rule, or regulations.

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

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

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

(2) The decision of the presiding official is based upon 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:

MICHAEL H. HOXIE,
Presiding Official.