

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

WAYNE E. PETERS,
appellant,

v.

DEPARTMENT OF ENERGY,
agency.

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) DOCKET NUMBER
) DC03518510098
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) DATE: OCT 31 1985
)
)

BEFORE

Herbert E. Ellingwood, Chairman
Maria L. Johnson, Vice Chair
Dennis M. Devaney, Member

OPINION AND ORDER

The appellant petitioned the Board's Washington, D.C. Regional Office for appeal of the agency's action changing him to a lower-graded position by reduction in force (RIF) procedures, effective November 10, 1984. The appellant argued that the agency violated the RIF regulations by promoting another employee immediately prior to the RIF to protect that employee from being bumped by the appellant. The presiding official found that there was no evidence that the promotion was illegal, improper, or done to circumvent the RIF regulations. He concluded, therefore, that the appellant's assignment rights were properly determined, and affirmed the agency's action.

The appellant has now filed a petition for review of that decision, again arguing that the promotion was effected to protect another employee over the appellant, thus violating the appellant's RIF rights. We agree. The Board GRANTS appellant's petition and REVERSES the initial decision for the reasons stated below.

The record reflects that in August of 1983 Mr. James Workman, Director, Office of Fuels Programs, Economic Regulatory Administration (ERA), requested that Mr. Leonard Levine, a GM-14, be promoted to a GM-15 because certain duties had accreted to his position. On October 20, 1983, Mr. James Gallo, an agency classification specialist, denied the request. Mr. Workman protested the denial to the personnel director. It appears that no further action was taken on the request at the time.

In the Spring of 1984, the ERA underwent a reorganization. The retention register prepared on September 20, 1984, showed that the appellant was eligible for Levine's position and that Levine would be downgraded to a GS-11 position. When management learned that the appellant would bump Levine in the RIF, management asked Gallo to prepare a paper setting out ways to protect Levine. On September 25, 1984, Gallo prepared a paper setting out three options. App. Ex. 8. The first option--the option recommended by Gallo--was to follow the current staffing plan under which the appellant would bump Levine. Gallo noted, however, that that option was unacceptable to management. The second option was to create another GS-14 position for the appellant. This was the least recommended course of action. The third option, which Gallo describes as the "most realistic," was to promote Levine to an enhanced GM-15 position based on accretion of duties. Gallo states that there is "some merit" to this from a classification standpoint, but asks whether staffing could "live with another accretion of duties promotion." On September 27, 1985, Workman requested Levine's promotion and on September 30, nine days before the appellant received his RIF notice, Levine was promoted.

We find that the RIF was tainted by improper motivations. The agency wanted to protect Levine over the appellant. The agency tried unsuccessfully to get Levine an accretion-of-duties promotion one year prior to the RIF. Later, when a dry run of the RIF revealed that Levine would be bumped by the appellant, management specifically asked for options to save Levine. Having the RIF run its natural course was unacceptable to management.

Gallo's option paper had only one purpose: to protect Levine from being bumped by the appellant.

Further, the SF-52 requesting Levine's promotion bears the date "9-27-84" written over either "10-1-84" or "10-9-84." (The October date is not perfectly clear to read.) The appellant received his RIF notice on October 9, 1984. The written-over date strongly suggests that the agency wanted to assure that Levine's promotion would be effective before issuance of the the RIF notice to the appellant. This is further evidence of the agency's manipulating events to accomplish its desired purpose.

Upon consideration of this evidence, the Board concludes that the agency engaged in an impermissible circumvention of the RIF regulations by promoting Levine to avoid his being bumped by the appellant in the course of a reorganization. Therefore, even though the agency articulated legitimate management reasons for the RIF, the agency has failed to sustain its burden of showing by preponderant evidence that its application of the RIF regulations with respect to the appellant was proper.^{1/} See Wilburn v. Department of Transportation, 757 F.2d 260 (Fed. Cir.

^{1/}We note that in an onsite review conducted several months after the RIF, OPM found that Levine's GM-14 position description and his GM-15 position description were "virtually identical." OPM could find no distinction between the position descriptions which could explain the reclassification to the GM-15 position based on added duties and responsibilities. Appeal File, Tab 18. OPM asked the agency to submit a revised position description and evaluation statement supporting the higher grade. On March 8, 1985, four months after the RIF, the agency submitted a revised position description which satisfied OPM that there was a classifiable difference in positions. Appeal File, Tab 18. This evidence weighs against the propriety of the promotion. The agency promoted Levine using a position description which Gallo told the agency a year earlier did not justify a GS-15 classification and which OPM concluded did not justify a GS-15 classification. We do not however decide the propriety of the promotion itself.

1985); Drake v. Department of Commerce, 18 M.S.P.R. 475 (1983). See also Losure v. Interstate Commerce Commission, 2 MSPB 361, 365 (1980).

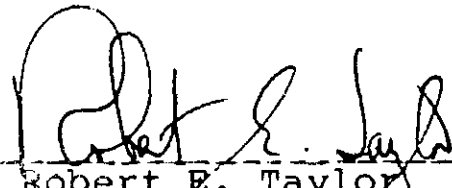
Accordingly, the initial decision is REVERSED. The agency is ORDERED to cancel the appellant's demotion, to offer the appellant Levine's former GM-14 position of Supervisory Natural Gas Analyst or another position having the same representative rate under 5 C.F.R. § 351.704(a) (1981), and to award appellant back pay and other benefits under 5 C.F.R. § 550.805.

Proof of compliance with this Order shall be submitted by the agency to the Clerk of the Board within twenty (20) days of the issuance of this Order. Failure to comply with the Board's order as directed may result in sanctions being imposed against the agency in accordance with 5 U.S.C. § 1205(a)(2) and 5 C.F.R. § 1201.184. If appellant believes that the agency has failed to comply fully with the Board's order, he should submit any such evidence or argument to the Secretary.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review, if the Court has jurisdiction, 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:


Robert E. Taylor
Clerk of the Board

Washington, D.C.