LEWIS A. SMITH
v.
DEPARTMENT OF THE AIR FORCE

Docket No.
AT035109027

OPINION AND ORDER

The Department of Air Force (agency) petitions the Board for review of the initial decision issued by the Board's Atlanta Field Office. In that decision, the presiding official found that the agency incorrectly computed the appellant's representative rate under 5 C.F.R. § 351.703, and reversed the agency's reduction-in-force (RIF) action.

The agency argues in its petition that the presiding official, by taking judicial notice of an article in the *Federal Employees News Digest, Inc.* which reprinted a schedule for the administration's proposed 7% pay raise, erred in interpreting 5 C.F.R. § 351.703(b) which provides that:

> Each employee's assignment rights shall be determined on the basis of the pay rates in effect on the date of issuance of specific notices of reduction in force, except that when it is *officially known* on the date of issuance of notices that new pay rates *have been approved* and will become effective by the effective date of the reduction in force, assignment rights shall be determined on the basis of the new pay rates. (Emphasis supplied.)

This Board determined in *Whittington v. Department of Air Force*, 4 MSPB 68 (1980), that publication in the *Federal Employees News Digest, Inc.* of a proposed pay raise does not constitute official notice for purposes of 5 C.F.R. § 351.703(b), inasmuch as that document was not "printed by authority of the government." Moreover, we stated that a proposed pay raise is not a "new pay rate [which has] been approved." Thus, in the instant case, the presiding official erred in finding that the agency committed harmful error by erroneously computing the representative pay rate for the purpose of determining the appellant's assignment rights.

In the petition for appeal, the appellant also alleged that the agency committed harmful error in offering the position of Quality Assurance Specialist (GS-11) to another employee who he contends had a lower retention standing. The presiding official, however, did not find it necessary to address this issue after having found that the agency committed harmful error in erroneously computing the appellant's representative pay rate. Since the presiding official erred in concluding that the agency had erroneously computed the appellant's representative pay rate, it is necessary to address this additional issue.

In *Losure v. Interstate Commerce Commission*, 2 MSPB 361 (1980), this Board set out the burden of proof to be applied in RIF cases. Under

5 U.S.C. § 7701(c)(1)(B), 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 this Board. The determination constitutes the agency "decision" which is to be sustained only if supported by a preponderance of the evidence, 5 U.S.C. § 7701(c)(1)(B). As such, that decision necessarily embraces the proper invocation of RIF regulations under 5 C.F.R. § 351.703(a) as well as the specific application of those regulations to the individual employee.[1]

In the instant case, the agency has presented uncontroverted evidence that the WS-7 position in which the appellant was placed was a higher grade position than the GS-11 position which was offered to an employee with a lower retention standing (Tr. 21, 22).[2] Therefore, the Board finds that the agency established by a preponderance of the evidence that the WS-7 position was the highest grade position available, and was therefore the best offer which could have been made to the appellant at that time. This offer was, therefore, in compliance both with 5 C.F.R. § 351.703 and the specific application of that regulation to the appellant as required under *Losure*.

Accordingly, the agency's petition for review is GRANTED, and the initial decision of March 13, 1980, is REVERSED. The agency's reduction-in-force action with respect to the appellant is AFFIRMED.

This is the final order of the Merit Systems Protection Board in this appeal. Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. § 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

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[1]Under 5 C.F.R. § 351.703(a), an agency shall assign under section 351.603, group I (career employees who are not serving a probationary period and who are competing for positions at and below the grade in which he/she served on a permanent basis) or group II employees (employees serving a probationary period, each career-conditional employee, and each career employee in an obligated postion) in a position in the competitive service, rather than furlough or separate him, to a position in the competitive service in another competitive level in his competitive area which requires no reduction, or the least possible reduction, in representative rate when a position in the other competitve level is held by an employee: (1) In a lower subgroup or (2) with a lower retention standing.

[2]We note that the agency admits that the GS-11 position would have been a higher grade position than the WS-7 position which was offered to the appellant if the administration's proposed 7% pay raise was in effect on the date of issuance of the specific RIF notices, or if it were "officially known" on the date of the notices that new pay rates had been approved and would become effective by the effective date of the RIF. (Tr. 22.) As pointed out above, the proposed 7% pay raise was, however, neither in effect nor officially known on the date of the issuance of the specific RIF notices.

For the Board:

ROBERT E. TAYLOR,
Secretary.

WASHINGTON, D.C., *August 3, 1981*