UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

ERVEN N. WILLIAMS v. TENNESSEE VALLEY AUTHORITY	DOCKET NUMBER AT03518210550 DATE: 27 NOV 1984

OPINION AND ORDER

The agency separated appellant from his position as the Assistant to the Chief of Management Services for the Office of Economic and Community Development (OECD), effective January 14, 1982, pursuant to a reduction in force (RIF). On appeal to the Board's Atlanta Regional Office, the presiding official found that the agency properly invoked the RIF regulations because of a budget cut and reorganization at OECD. She determined, however, that appellant's competitive area should have included not only the Management Services, but also the Division of Community Development and the Division of Economic Development, because all three divisions were under the single appointing authority of Richard Morgan, Manager of OECD. The presiding official found that appellant was not discriminated against as to his substantive rights under the regulations. But, she found that appellant proved the agency discriminated against him on the basis of race by failing to assign him to a vacant position, finding that the agency had a policy and practice of assigning employees to vacant positions and thus that

appellant was entitled to an equal application of that policy.[1] Therefore, she reversed the agency action.

In its petition for review,[2] the agency asserts that the presiding official erred in finding that appellant's competitive area should have included all three divisions because Mr. Morgan was the single appointing authority. It also contends that the same regional office, in two previous decisions, upheld the competitive area as proper.

When an agency undertakes a RIF, it has the burden of proving by a preponderance of the evidence that it properly invoked and applied the RIF regulations. Losure v. Interstate Commerce Commission, 2 MSPB 361, 365-66 (1980). We find that the agency has failed to carry its burden of showing that it correctly determined appellant's competitive area. The regulations state that a competitive area includes " . . . all or that part of an agency in which employees are assigned under a single administrative authority."

1/ The presiding official found that "there was no evidence that the actual RIF procedures were discriminatorily applied," and further stated that "his discrimination claim rests upon his ability to demonstrate that, though having no regulatory right of assignment, the agency's sole motivation in not reassigning him was a discriminatory intent." Initial Decision (I.D.) at 6 n.3.

2/ Appellant contends that the agency's petition for review was untimely. The petition, which does not indicate when it was sent, was received by the Board one day after the filing deadline. Because an unmarked petition is presumed, absent other evidence, to have been filed five days before the date of receipt, we find the petition for review timely. See Dickinson v. Department of Energy, 3 MSPB 335, 337 (1980).

Both appellant and the agency submitted additional information after filing the petition for review and the response to the petition for review. The Board's regulations do not provide for submissions beyond the petition and response. Bize v. Department of the Treasury, 3 MSPB 261 (1980). Therefore, the Board has not considered the additional information on review.

5 C.F.R. § 351.402(b). Although the regulations do not define "single administrative authority," the Board has held that the term must be associated with the degree and extent of administrative control which the head of an organization exercises over operations, work functions, and personnel administration for employees in that organization. Webb v. Department of Labor, MSPB Docket No. DC03518210504 at 6 n.8 (October 14, 1983). The Board has further stated that it concerns the authority to make decisions to establish or abolish positions, assign duties, and take personnel actions. Coleman v. Department of Education, MSPB Docket No. DC03518210334 at 4 (July 3, 1984).

Consistent with this precedent, the presiding official found that appellant's competitive area should have included all three divisions because Mr. Morgan exercised the sole authority in determining which jobs to retain and which to eliminate in all three divisions. Initial Decision (I.D.) at 4. Although the agency argues that the evidence does not support the presiding official's finding, it has not identified anything in the record showing error by the presiding official. The agency's mere disagreement with the presiding official's conclusions concerning the evidence does not justify a complete review of the record. See Weaver v. Department of the Navy, 2 MSPB 297, 298-99 (1980). We find, therefore, that the agency has failed to show that it properly established appellant's competitive area.3/

3/ The agency also argues that the presiding official acted inconsistently in finding the same competitive area proper in another appeal from the same RIF. In issuing an initial decision, however, a presiding official's findings of fact and conclusion must be based on the evidence of record. See 5 C.F.R. § 1201.111(b)(1). Here, the agency failed to present evidence sufficient to prove that it properly

[Footnote continued on next page.]

The agency also contends that the presiding official improperly reached appellant's discrimination allegation because the issue of its failure to reassign appellant was not within the Board's jurisdiction. The agency's petition for review is GRANTED. 5 U.S.C. § 7701(e).

We find that the presiding official erred in finding that the agency had a policy and practice of assigning employees during the course of the RIF and in asserting jurisdiction over appellant's allegation of discrimination as to agency selections which were not within the ambit of the RIF. Although the presiding official correctly stated that an agency may properly choose to exercise its discretion to grant its employees RIF rights that exceed those provided by 5 C.F.R. Part 351, the evidence in the record does not support a finding that the agency established such a policy and practice of assigning excepted service employees to vacant positions in connection with their RIF rights. Indeed, the presiding official specifically found that the record contained "no direct evidence or testimony establishing that the agency was mandated by either policy, practice or regulation, or agreement to provide reassignment rights to its employees." I.D. at 7. The presiding official nevertheless found that such a policy and practice existed because, in essence, the agency re-employed the bulk of its employees affected by the RIF. However, the agency's actions in selecting such employees cannot be deemed to have extended the RIF rights of excepted service employees. Those employees were not exercising their RIF rights in bidding for such positions. Rather, such positions were filled

[Footnote 3 continued.]

established the competitive area. That it presented sufficient evidence in another appeal does not, by itself, show that the presiding official erred in this case. See Berry v. Department of Energy, MSPB Docket No. DC03518210050 at 5 (June 5, 1984).

pursuant to selection procedures independent of the RIF and constituted distinct personnel actions over which the Board did not have jurisdiction. Cf. Dante v. National Science Foundation, MSPB Docket No. DC03518110773 at 3 (August 19, 1983) (Board does not have jurisdiction over agency filling of vacancies pursuant to selection process). Thus, the Board did not have jurisdiction over appellant's allegation of discrimination as to those selections, since the Board does not have jurisdiction over discrimination allegations which are not within the context of an otherwise appealable action. Id; Wren v. Army, 2 MSPB 174 (1980).[4]

The presiding official's finding that appellant was not discriminated against in the invocation of RIF regulations or the application of those regulations is SUSTAINED.

Accordingly, the initial decision is AFFIRMED as MODIFIED and the agency is ORDERED to cancel appellant's separation and to award back pay and benefits in accordance with the agency's regulations. Proof of compliance with this Order shall be submitted by the agency to the Office of the Clerk of the Board within 20 days of the date of issuance of this opinion. Any petition for enforcement of this Order shall be made to the Atlanta Regional Office in accordance with 5 C.F.R. § 1201.181(a).

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

The appellant has the statutory right under 5 U.S.C. § 7702(b)(1) to petition the Equal Employment Opportunity

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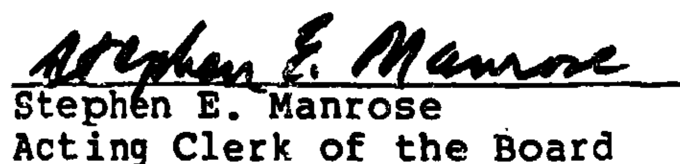
[4] In Cowan v. Department of Agriculture, 11 MSPB 459, 460 (1982), aff'd, 710 F.2d 803 (Fed. Cir. 1983), the Board expressly rejected a similar contention that an agency directive should be interpreted as granting assignment rights where the agency had filled vacant positions during a previous RIF. There, the Board found that such vacancies were not filled pursuant to the directive and thus could not be relied upon to support that interpretation. Id.

Commission (EEOC) for consideration of the Board's final decision with respect to claims of prohibited discrimination. The statute requires at 5 U.S.C. § 7702(b)(1) that such a petition be filed with the EEOC within thirty (30) days after notice of this decision.

If the appellant elects not to petition the EEOC for further review, the appellant has the statutory right under 5 U.S.C. § 7703(b)(2) to file a civil action in an appropriate United States District Court with respect to such prohibited discrimination claims. The statute requires at 5 U.S.C. § 7703(b)(2) that such a civil action be filed in a United States District Court not later than thirty (30) days after the appellant's receipt of this order. In such an action involving a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, the appellant has the statutory right under 42 U.S.C. §§ 2000e-5(f)-(k), and 29 U.S.C. § 794a, to request representation by a court-appointed lawyer, and to request waiver of any requirement of prepayment of fees, costs, or other security.

If the appellant chooses not to pursue the discrimination issue before the EEOC or a United States District Court, the appellant has the statutory right under 5 U.S.C. § 7703(b)(1) to seek judicial review, if the Court has jurisdiction, of the Board's final decision on issues other than prohibited discrimination before the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The statute requires at 5 U.S.C. § 7703(b)(1) that a petition for such judicial review 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.