

Cliff Guffey, Executive Vice President

From: Dockins, John W - Washington, DC [john.w.dockins@usps.gov]
Sent: Wednesday, May 13, 2009 8:22 AM
To: Cliff Guffey, Executive Vice President
Subject: Vets

Cliff:

When the Merit Systems Protection Board (MSPB) determines whether an employee who has been assigned to a position in a different pay schedule during a reorganization has been demoted under OPM's RIF regulations at 5 C.F.R. Part 351, the representative rates of the employee's former and new positions must be compared. Campbell v. Department of Treasury, 61 M.S.P.R. 99 (1994). The same process is used by the MSPB when it is analyzing whether an employee has sustained a demotion or been given a lateral reassignment in an adverse action case under 5 U.S.C. Chapter 75.

Does this answer your question?

John D.



LEXSEE 61 M.S.P.R. 99

DIANE K. CAMPBELL, Appellant, v. DEPARTMENT OF THE TREASURY, Agency

DOCKET NUMBER DC0752910182M1

MERIT SYSTEMS PROTECTION BOARD

61 M.S.P.R. 99; 1994 MSPB LEXIS 217

February 28, 1994

COUNSEL:

[**1]

Thomas A. Campbell, Centreville, Virginia, for the appellant.

Randy W. Thomas, Esquire, Washington, D.C., for the agency.

OPINION:

[*100] BEFORE

Ben L. Erdreich, Chairman

Jessica L. Parks, Vice Chairman

Antonio C. Amador, Member

OPINION AND ORDER

The appellant petitions for review of the remand initial decision, issued on June 1, 1992, that dismissed her appeal for lack of jurisdiction. For the reasons set forth below, we GRANT the petition under 5 U.S.C. § 7701(e), VACATE the initial decision, and ORDER the agency to cancel the appellant's demotion.

[*101] BACKGROUND

The appellant alleged that her assignment from a supervisory position, Chief, Editorial Services Branch (CES), TM-13, to a nonsupervisory position, Writer/Editor (W/E), grade 15, in a new pay-banding system, resulted in a reduction in grade because her former TM-13 position was the same as the grade 17 Deputy Director, Editorial Services (DDES), position in the new pay system. She alleged further that the agency should have effected its reorganization of the Communications Services Division using reduction-in-force (RIF) procedures.

The administrative judge dismissed the appeal for lack of jurisdiction. She did not [**2] compare the CES position to the DDES position. Rather, she compared the CES position to a new position created during the reorganization, Deputy Director, Publications Management (DDPM). The DDPM position replaced the DDES position, which had ceased to exist by the time of this appeal. The administrative judge found that the DDPM position was not the successor position to the appellant's CES position, and that the appellant therefore had not shown that she had been reduced in grade. She found further that, because the appellant had not been reduced in grade, RIF procedures were not required. The Board denied the appellant's petition for review of the initial decision by short-form order. *See Campbell v. Department of the Treasury, 49 M.S.P.R. 641 (1991)* (Table).

The appellant filed a petition for judicial review in the United States Court of Appeals for the Federal Circuit. Upon further review, the Board requested that the court remand the case because the initial decision made findings of fact not supported by the evidence of record. The court granted the request, and the Board remanded the case to the administrative judge, directing her to permit the appellant to submit [**3] evidence regarding the DDES position, and to issue a new initial decision. *See Remand Appeal File (RAF), Tab 1.*

In the remand initial decision, the administrative judge compared the CES position to the DDES position. She found that the appellant had not shown that the DDES position was the successor to her CES position, and that the appellant's assignment from the DDES position to the W/E position therefore was not a reduction in grade.

The administrative judge also found that the W/E position was not identical to the appellant's former CES position, and that, because the appellant's CES position ceased to exist, the agency was required to assign the appellant to the new position that best reflected her job duties and responsibilities. She found further that the appellant had not shown that such an agency determination constituted a classification change or a classification error or was in any other respect an action that was appealable to the Board. On the basis of these [*102] findings, the administrative judge found that the appellant had not made a non-frivolous allegation of Board jurisdiction, and she denied the appellant's request for a hearing.

In her petition for review, [**4] the appellant generally disagrees with the findings of the administrative judge, and maintains that she was demoted without the benefit of RIF procedures. Essentially, the appellant asserts that any differences between the DDES position and the CES position are not grade-controlling, and that the administrative judge erred in failing to hold a jurisdictional hearing.

ANALYSIS

As explained below, we find that, regardless of whether the DDES position is the successor to the CES position, the appellant was demoted.

In *Broderick v. Department of the Treasury*, 52 M.S.P.R. 254 (1992), as in the present appeal, the appellants were assigned from positions under one pay method category to positions under another. The Board noted in its decision that, under those circumstances, the representative rates of pay for the positions at issue -- not the appellants' actual rates of pay -- determined whether the appellants had been demoted. *Id.* at 259 n.6. It noted further that, unless representative rates were compared, it would be impossible to determine whether employees' grades had been reduced or increased. *Id.*

The regulatory authority on which the Board relied in the part [**5] of *Broderick* cited above, 5 C.F.R. § 536.201, does not apply to Office of Thrift Savings employees such as the appellant, since those employees are not subject to chapters 51 and 53 of title 5, *U.S. Code*, 12 U.S.C. § 1462a(g). The rule stated in *Broderick*, however, is consistent with 5 C.F.R. § 210.102(b)(4), which defines the term "demotion," as including "a change of an employee, while serving continuously within the same agency[,] . . . [t]o a position with a lower rate of pay when . . . the old and the new positions . . . are in different pay method categories." This regulatory definition is applicable generally under regulations promulgated by the Office of Personnel Management, and is not limited to employees or positions covered by chapters 51 and 53. We therefore extend, to employees not subject to chapters 51 and 53 of title 5, the principle that an assignment to a position in a different pay system constitutes a demotion if the representative rate of the position to which the employee is assigned is lower than that of the employee's former position.

Under 5 C.F.R. § 532.401, the representative rate of a General Schedule grade is the fourth step of that grade. [**6] We know of no similar provision defining the representative rate of a grade in the pay [*103] system that included the appellant's former position. We note, however, that that system was similar to the General Schedule in that it included 10 steps. *See* Initial Appeal File (IAF), Tab 1. For this reason, and in the absence of any indication that a different method should be used to determine the representative rate of the grade of the appellant's former position, we find that that rate was that of the fourth step of the grade, or \$ 50,662. *See id.* According to the notice informing the appellant of the assignment at issue here, the pay scale for the appellant's new position was \$ 35,779 to \$ 50,241. *Id.* Since the top rate of the new position's grade was less than the representative rate of the appellant's former grade, it follows that the representative rate of the grade of the new position was lower than the representative rate of the grade of the appellant's former position. We therefore find that the appellant was demoted.

The agency acknowledges that the appellant's assignment occurred as a result of a reorganization. *See, e.g.*, IAF, Tab 12 (agency response at 2); [**7] RAF, Tab 6 (agency brief at 6, affidavit of R. Schmermund at 2). By demoting the appellant, the agency released her from her competitive level. *See* 5 C.F.R. § 351.403(a) (competitive level includes certain positions at a single grade level). An employee who has been released from her competitive level by demotion as a result of an agency's reorganization, and who is covered by the RIF regulations, is entitled to appeal the demotion to the Board. *See* 5 C.F.R. §§ 351.201(a)(2), 351.901. We see no indication that the appellant in this case, a civilian employee of the executive branch of the federal government, is not covered by the RIF regulations. *See* 5 C.F.R. §

351.202(a) (5 C.F.R. part 351 applies to "each civilian employee in . . . [t]he executive branch of the Federal Government . . ."). We therefore find that the appellant's demotion constitutes an appealable RIF action.

We note further that employees covered by the RIF regulations are entitled to certain protections provided under those regulations. These include protections related to their retention in or release from their competitive levels and, in the case of competitive service employees such as the [**8] appellant, protections related to assignment rights. The record shows, however, that the agency did not follow the RIF regulations in effecting the appellant's demotion. Accordingly, the appellant's demotion cannot be sustained. See *Horne v. Merit Systems Protection Board*, 684 F.2d 155, 157-59 (D.C. Cir. 1982) (when the agency failed to effect an action under RIF regulations, the action could not be sustained on the basis of a finding that a proper RIF action could have achieved the same result); *Vincent v. Department of Transportation*, 47 M.S.P.R. 550, 558 (1991) (the proper determination of an employee's entitlement under RIF regulations is a substantive [*104] right, not merely a procedural requirement subject to the harmful error standard).

ORDER

We ORDER the agency to cancel the appellant's demotion and to restore the appellant effective December 12, 1990. See *Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must accomplish this action within 20 days of the date of this decision.

We also ORDER the agency to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits under the [**9] Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's Order and of the date on which the agency believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and should include the dates and results of any communications with the [**10] agency about compliance.

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

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you [*105] have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

Legal Topics:

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