UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JAMES R. HOLTGREWE, Appellant, v. FEDERAL DEPOSIT INSURANCE CORPORATION, Agency.	DOCKET NUMBER DE075289C0167 DATE: MAY 5 1993

James R. Holtgrewe, Grand Island, Nebraska, pro se.

Edwin C. Houldsworth, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

Chairman Levinson issues a concurring opinion.

OPINION AND ORDER

The appellant has petitioned for review of a compliance initial decision issued by an administrative judge of the Board's Denver Regional Office. In that decision, the administrative judge found that the agency was in compliance with *Holtgrewe v. Federal Deposit Insurance Corporation*, MSPB Docket No. DE07528910167 (Initial Decision, June 6, 1989). For the reasons set forth below, we GRANT the appellant's petition for review under 5 C.F.R. § 1201.115 and REVERSE the compliance initial decision.

BACKGROUND

The agency removed the appellant for unsatisfactory performance, and the appellant filed a petition for appeal of this action. In his initial decision on the merits of the appeal, the administrative judge sustained the charge of unsatisfactory performance, but mitigated the removal action to a demotion from the position of GG-9 Assistant Bank Examiner to that of GG-7 Assistant Bank Examiner. The initial decision became final when the Board denied both the agency's petition for review and the appellant's cross petition for review. *Holtgrewe v. Federal Deposit Insurance Corporation*, 43 M.S.P.R. 154 (1989) (Table).

In response to the appellant's petition for enforcement of the administrative judge's decision on the merits, the agency presented evidence that it cancelled the removal action. Initial Compliance File (ICF), Tab 3(7). The matter currently in dispute concerns the duty location to which the appellant is to be restored. The agency did not reinstate the appellant in his employing office in Nebraska, but offered the appellant a GG-7 Assistant Bank Examiner position at one of five locations: Los Angeles, California; Chicago, Illinois; Hays, Kansas; New York, New York; and Fargo, North Dakota. ICF, Tab 3(4). The appellant, however, maintains that he is entitled to a position in his former office, the Grand Island, Nebraska, Field Office.[1]

[1] The appellant claimed in his petition for enforcement that a geographical move would place a "great burden" upon him, and

ANALYSIS

In determining whether an agency has complied with a Board order, the Board must determine whether an agency has placed the employee "as nearly as possible in the *status quo ante*." *Kerr v. National Endowment for the Arts*, 726 F.2d 730, 733 (Fed. Cir. 1984). This principle applies not only where an action has been ordered cancelled, *id.*, but also where the penalty has been mitigated. *See Mann v. Veterans Administration*, 29 M.S.P.R. 271, 274 (1985) (removal mitigated to a suspension). The agency provided its reasons for not affording the appellant a position in the Nebraska office. ICF, Tab 3(8). According to the affidavit of Michael A. Hovan, Jr., these reasons are as follows:

> 7. I decided not to place Mr. Holtgrewe in the Grand Island, Nebraska office because there are no vacant grade 7 positions in that office. Moreover, there are no vacancies in the office for any bank examiner positions, regardless of grade level. The office is currently overstaffed.
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> 8. I did not place Mr. Holtgrewe in the Grand Island office because the workload level of that office does not warrant any addition to the examination staff. The office is one of the few field offices in the country that is current and up-to-date with its examinations of financial institutions. Accordingly, it is in full compliance

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that he was entitled to placement in the Nebraska office. He also indicated in his submission, however, that he offered to return to work at the Los Angeles, California, facility, but that he was told that he "must settle another unrelated matter before he would be given a job with the Agency." Compliance Petition for Review File, Tab 1. The appellant does not request Board assistance in obtaining the position in California, however. In light of his express desire to be assigned to the Nebraska office, we will not consider the matter of the California position. The appellant may file a separate petition for enforcement with the Board's regional office on that matter if he so desires.

> with General Memorandum No. 1, which is the DOS statement setting forth the policy regarding the frequency of financial institutions' examination.
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> 9. I also did not place Mr. Holtgrewe in the Grand Island office because I believe it to be in the best interests of both Mr. Holtgrewe and the FDIC if he returned to work with a "clean slate" in a field office other than the one from which he was discharged.

Id.

In his compliance initial decision, the administrative judge stated that "these reasons would not justify a reassignment if the agency action had been reversed." He also found, however, that they do "justify the reassignment in connection with this Board ordered demotion." Compliance Initial Decision at 4. In so finding, the administrative judge determined that the concept of *status quo ante* was "inapplicable to cases where a removal is mitigated to a demotion." *Id.* at 3. The administrative judge relied upon the case of *Novinsky v. Department of Defense*, 37 M.S.P.R. 272 (1988), for his conclusion that the concept of *status quo ante* was inapplicable to this case. In *Novinsky* at 275, however, the Board merely held that, in a case where the Board ordered a demotion from the position of Assistant Principal to that of Teacher, the employee was not entitled to use the subsequent compliance proceeding "to modify the Board's order and dictate the nature of his demotion" by requesting placement into the position of Education Specialist rather than Teacher. In this case, the parties do not seek to change the terms of a Board order, however, but are simply in dispute as to the construction of its terms.

In *Jackson v. Veterans Administration*, 31 M.S.P.R. 135, 136 (1986), a case where the agency was ordered "to cancel appellant's removal [and] to substitute in its place a demotion to a non-supervisory position at the next lowest grade," the Board held that "the agency should not be burdened by having to create a job for which no need exists for the purpose of accommodating a disciplinary demotion." The Board reiterated its ordered relief and added, alternatively:

> In the event an equivalent position does not presently exist for which appellant is qualified or could become qualified through education and training without undue interruption of the agency's mission, the agency is ORDERED to place appellant in the highest available non-supervisory position for which he is presently qualified until such time as an equivalent position becomes vacant and which the agency elects to fill.

Id. at 137. The Board further stated in *Jackson* that "[t]he particular position to which appellant is to be assigned shall be at the considered discretion of the agency to the extent consistent with this Order." *Id.*

It is well settled that, where an agency is ordered to restore an employee to the position from which he was removed, it must provide the Board with a strong overriding interest for its failure to do so. *See Mann*, 29 M.S.P.R. at 274. In the event of a removal mitigated to a demotion to another position, however, *Jackson* indicates that more deference is given to the agency's discretion to determine the needs of its

mission when complying with the Board's order.[2] Nevertheless, the concept of *status quo ante* still requires that the employee be restored as nearly as possible to his previous situation, within the terms of the Board's order. *See Kerr*, 726 F.2d at 733. For this reason, the Board in *Jackson*, 31 M.S.P.R. at 137, while recognizing that an agency should not be burdened with creating a position for which no need exists, also protected the appellant's rights by ordering his placement into the highest available nonsupervisory position for which he qualified until such time as a position called for by the Board's order became available. In addition, in *Mann*, 29 M.S.P.R. at 275, the Board examined the legitimacy of the agency's reasons for reassigning the appellant rather than reassigning her replacement.

Upon balancing the competing interests of the agency and the appellant in this case in light of the reasoning in *Jackson* and *Mann*, we note, initially, that the agency has not stated at what point the Nebraska office became overstaffed.

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[2] The concurring opinion states that the majority is applying "the same test the Board applies when it has simply reversed the agency's action altogether and ordered reinstatement." Concurring Opinion at 4. Such is not the case, however. When the Board or an administrative judge has ordered cancellation of the action appealed, the Board requires that the agency justify its failure to return the employee to his previous position by showing a "strong overriding interest" supporting its actions. *See, e.g., Shelton v. United States Postal Service*, 53 M.S.P.R. 483, 485 (1992); *Hill v. Department of the Air Force*, 49 M.S.P.R. 271, 273-74 (1991); *Mann*, 29 M.S.P.R. at 274. In the present case, the Board is requiring the agency to show only "overriding circumstances" -- a somewhat less demanding standard than that applied in *Shelton*, *Hill*, and *Mann*.

Its claim that there were no vacancies for bank examiners of any grade level is not persuasive, since the appellant occupied the position of a grade 9 bank examiner until he was removed and would have been entitled to return to that position in Nebraska had he received all the relief he sought in his appeal. Moreover, the appellant performed successfully as a grade 7 employee, and it is not apparent why he would need a "clean slate" in order to do so again.

We note the argument in the concurring opinion, that the Board's demotion orders should not be construed to give an appellant a superior claim to any job unless the person holding it can be considered his "replacement." Concurring Opinion at 6. As a practical matter, however, distinguishing "replacement" employees from other employees could be difficult or impossible. For example, if an agency fills an appellant's former position at the same time that it fills a position identical to it, the incumbent of either position could be considered a "replacement." In addition, if the agency hires an entry-level employee after removing an appellant from a higher level position, and if it later promotes another employee to the appellant's grade level, either employee could be considered a "replacement." Moreover, the fairness of a test that would, in effect, treat "replacement" employees differently than others is doubtful, particularly inasmuch as an employee may not even be aware, when he is hired, promoted, or reassigned, that he is considered a "replacement" employee.

Additionally, we note that an agency can virtually always move work into an office that is overstaffed. Although such an action could result in an inefficient or otherwise undesirable arrangement, so that requiring an agency to take the action could therefore be deemed unreasonable, the agency's authority to move the work would, nevertheless, seem to preclude a finding that the agency "could not have [returned the appellant to his former location] without either creating an unnecessary job or transferring another employee who could not be considered a replacement." Concurring Opinion at 7-8.

In this case, the agency has proffered a lack of grade 7 vacancies, and its desire to have the appellant return to work with a "clean slate," as the reasons for its decision to solve its asserted overstaffing problems by reassigning the appellant rather than another employee.[3] Implicit in the initial decision mitigating the agency's action, however, is the finding that the appellant was a previously-satisfactory employee who was promoted to duties that were beyond his current capabilities, but who should have been allowed to return to duty at his previous level where he had exhibited satisfactory performance. We find that the agency has not met its burden of proving that overriding circumstances require

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[3] The Board is not suggesting herein that the agency is required to reassign another employee from Grand Island, Nebraska, to another location.

the appellant's reassignment in order to bring about this result. *See Mann*, 29 M.S.P.R. at 274-75.

ORDER

Accordingly, we find that the agency has not complied with the Board's decision mitigating his removal. Therefore, we ORDER the agency to reinstate the appellant to the position of Assistant Bank Examiner, in the agency's Grand Island, Nebraska, Field Office, at the grade level of GG-7 rather than GG-9, effective January 27, 1989. We further ORDER the agency to submit to the Clerk of the Board within 10 days of the date of this order, satisfactory evidence of compliance with the Board's decision. Failure to comply may result in the imposition of sanctions pursuant to 5 U.S.C. §§ 1204(a)(2) and 1204(e)(2)(A)[4] and 5 C.F.R. § 1201.183.[5]

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.

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[4] Section 1204(a)(2) provides that the Board may order a Federal employee to comply with its orders and enforce compliance. Section 1204(e)(2)(A) provides that the Board may order that an employee "shall not be entitled to receive payment for service as an employee during any period that the order has not been complied with." The procedure for implementing these provisions is set forth at 5 C.F.R. § 1201.183.

[5] The appellant also alleges, in his petition for review, that the agency has not complied with the Board's order with respect to his back pay. The Board has issued an Opinion and Order concerning this assertion. *Holtgrewe v. Federal Deposit Insurance Corporation*, 51 M.S.P.R. 371 (1991).

CONCURRING OPINION OF
CHAIRMAN DANIEL R. LEVINSON

In
Holtgrewe
v.
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(DE075289C0167)

I agree that the agency is required to return the appellant to its Grand Island, Nebraska facility. However, my conclusion rests on only two of the four reasons cited by the majority: the agency's failure to establish when it became overstaffed and its failure to show the need for a "clean slate."

In my view, the majority opinion does not fully reflect the important differences in the rights and obligations of agencies when the Board orders an appellant returned to his old job, as in *Mann v. VA*, 29 M.S.P.R. 271, 274 (1985), and their rights and duties when ordered to demote the appellant to a different job, as in this case and *Jackson v. VA*, 31 M.S.P.R. 135 (1986). These orders also affect the legitimate interests of other employees differently.

I.

In the merits phase of this case, the administrative judge found that the appellant had performed unsatisfactorily as a GG-9 Assistant Bank Examiner. However, he mitigated the penalty and ordered the agency to substitute "a demotion to Assistant Bank Examiner, GG-7." Initial Decision at 10. His decision became the Board's final order when both the agency's petition for review and the appellant's cross-petition were

denied. *Holtgrewe v. Federal Deposit Insurance Corporation*, 43 M.S.P.R. 154 (1989) (Table).

When the agency offered the appellant positions in several different locations instead of returning him to the facility from which he was removed, Grand Island, Nebraska, he filed this petition for enforcement of the order. The administrative judge denied the petition. He first held the *status quo ante* principle that usually governs Board enforcement proceedings inapplicable when the agency's action has been mitigated rather than reversed. Initial Decision at 3. Without explicitly defining the standard he applied in lieu of this principle, the administrative judge concluded that the agency was obliged to offer the appellant a GG-7 position with "substantially the same duties and responsibilities" he would have had if demoted in the first place, but a geographic reassignment was not precluded. *Id.* at 3-4. Because the agency showed the GG-7 positions at its various locations were essentially similar and because it offered legitimate reasons for reassigning the appellant (overstaffing at Grand Island and the desirability of a "clean slate" for the appellant), the administrative judge found the agency in compliance. *Id.* at 4.

The majority opinion rejects this conclusion. It gives four specific reasons for finding the appellant entitled to return to Grand Island: the agency has not said when that office became overstaffed; had he been awarded "all the relief he sought in his appeal," the appellant would have been entitled to reinstatement to his previous position; the lack of

any apparent reason for the appellant to need a "clean slate;" and the agency's failure to explain why it did not reassign another employee to cure the overstaffing. Majority op. at 6 - 9. Accordingly, after "balancing the competing interests" of the agency and the appellant, the majority concludes the agency has not justified its decision to reassign the appellant by proving it was *"required"* by *"overriding circumstances."* *Id.* at 8-9 (emphasis supplied).

II.

The *status quo ante* principle is of questionable utility when the Board has ordered the agency to mitigate the penalty of removal to a demotion. By definition, the *status quo ante* simply is not going to be restored because the appellant is not being reinstated to his old job.

More importantly, in *Jackson* this Board recognized that the merit principles direct agencies to use the federal work force "efficiently and effectively" and that our decisions should not compel them to do otherwise. 31 M.S.P.R. at 136, *quoting* 5 U.S.C. § 2301(b)(5). Unless the Board acts with great care when enforcing demotion orders, they may affect the very structure of the *positions*, not just the people, in the agency's work force. This strikes at the very core of the agency's authority. For, as the Federal Circuit has recognized, the "decision on the composition and structure of the work force reflects the kind of managerial judgment that is the essence of agency discretion." *Gandola v. F.T.C.*, 773 F.2d 308, 311 (Fed. Cir. 1985). Just as those decisions are "not

meet for judicial reevaluation," *id.*, they are equally ill-suited for second-guessing by the Board. Thus, when the Board is called upon to determine whether an agency has complied with a Board order requiring that an appellant be demoted, it must not intrude on the agency's right to organize its work force in the way it deems best suited to most efficiently accomplish its mission.

The majority opinion acknowledges that our decision in *Jackson* requires "increased deference" to the "agency's discretion to determine the needs of its mission" when the Board has ordered a demotion in lieu of the agency's chosen penalty. Majority op. at 5-6. But the majority would still require the agency to demonstrate "overriding circumstances" to depart from the *status quo ante* in any respect other than the grade level at which the appellant is returned. *Id.* at 8. This is the same test the Board applies when it has simply reversed the agency's action altogether and ordered reinstatement.[1] *See, e.g., Shelton v. United States Postal Service*, 53 M.S.P.R. 483, 485 (1992); *Hill v. Department of the Air Force*, 49 M.S.P.R. 271, 273-74 (1991); *Mann v. Veterans Administration*, 29 M.S.P.R. 271, 274 (1985). Hence, it is hard to credit the majority's claim to have deferred to the agency's

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1. Although the majority counters that an "overriding interest" is a "somewhat less demanding standard" than a "strong overriding interest," majority op. at 6 n.2, I fail to see what is gained by dropping one of the two adjectives. In practice, this difference will surely prove ephemeral.

unquestionable right to staff its offices as it sees fit when "balancing" the interests of the parties.

In addition, the majority also fails to recognize critical differences between the competing interests of the appellant and other employees when the Board orders demotion rather than reinstatement. When the Board directs the appellant's reinstatement to his old job, it has determined that the appellant was wrongfully removed from it. It also follows from that determination that any successor appointed to that position was wrongfully appointed to it, even if through no fault of his own. Thus, the Board may legitimately require the agency to reinstate an appellant to his old job even if it must remove his replacement from that spot. *Cf. City of Richmond v. J.A. Croson*, 109 S.Ct. 706, 738 (1989) (Scalia, J., concurring in the judgment) (state may lawfully "'undo the effects of past discrimination'" by removing occupant of position in order to place in it person previously denied job because of racial discrimination.)

On the other hand, when the Board orders a demotion, it has concluded that the appellant was rightfully taken out of his previous position but that a reasonable person would have placed him in a different job rather than remove him from the agency's rolls altogether. *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 302 (1981). As a general rule, but for the Board's order, that appellant would have no right whatsoever to any other job with the agency after failing to

perform satisfactorily in his GG-9 position.[2] *See Griffin v. Defense Mapping Agency*, 864 F.2d 1579, 1580 - 81 (Fed. Cir. 1989). Our demotion orders certainly should not be construed to give an appellant a superior claim to any job *unless the person holding it can be considered his replacement.*

The majority's failure to recognize the differences between reinstatement and demotion orders leads to two errors. First, the majority falsely equates the two situations by looking to the relief available when reinstatement is ordered. For the reasons I have just given, what relief the appellant would have received had he been reinstated is simply irrelevant to the agency's obligation under a demotion order. In addition, this error leads to the majority's baffling suggestion that the agency may have had to transfer some other employee rather than the appellant to cure its overstaffing problem. The majority does not explain why some hapless employee, perhaps one whose conduct and performance have always been exemplary, should have been uprooted to make way for the appellant, who is partly responsible for his own plight.[3]

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2. In some instances, an employee may have a statutory right to be placed in a lower-graded position after failing to perform satisfactorily in a higher-graded one. *E.G.*, 5 U.S.C. § 3321(b). Or he may be given a similar right by agency policy or a collective bargaining agreement. There is no evidence the appellant in this case enjoys any such right.

3. The majority emphasizes that it is not "suggesting that the agency is *required*" to reassign another employee. Majority op. at 8 n.3 (emphasis supplied). Perhaps not. However, the majority's opinion clearly implies that agencies must offer a satisfactory reason to the Board for choosing to reassign a prevailing appellant in these circumstances rather than to reassign some other employee, replacement or not. First, the majority observes that in *Mann*, to which the majority looks for

Neither is there even a hint in the majority opinion that only employees who could be deemed the appellant's replacement should be at risk.

III.

Because of the potential consequences of a Board-ordered demotion on the agency and on other employees, I would not apply the same rules we apply in reinstatement cases. Rather, when the agency pleads the lack of an appropriate vacancy or the like, it should be given substantially more flexibility in complying with demotion orders in light of its responsibility for ensuring the efficient use of its work force. Instead of requiring the agency to justify every deviation from the *status quo ante* (other than, of course, the obvious change in grade and pay) by showing "overriding circumstances," it should only have to show that it has not disrupted the appellant's life any more than necessary to accommodate what it considers an effective and efficient work force structure and the legitimate interests of other employees.

Under this test, the agency would not have to return the appellant to Grand Island if the record shows it could not have done so when it removed the appellant or when the initial decision was issued without either creating an unnecessary job

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guidance, "the Board examined the legitimacy of the agency's reasons for reassigning the appellant rather than reassigning her replacement." *Id.* at 6. Then the majority itself examines the agency's reasons for reassigning the appellant in this case rather than "another employee" and finds them wanting. *Id.* at 8. Unlike *Mann*, however, the majority does not restrict the agency's obligation to explaining why the replacement is not reassigned.

or transferring another employee[4] who could not be considered a replacement.[5] To carry this burden, however, the agency must prove more than just that it was overstaffed at the time of the compliance proceeding. If, for example, there were a vacant GG-7 position at Grand Island when the agency removed the appellant, he could have been placed in it without degrading the effectiveness of the work force. The same would be true if a vacancy existed at any time between the removal and the initial decision. Moreover, the Board's decision to mitigate the penalty in this case means that the appellant would have been placed in any such vacancy had the agency acted reasonably. Any other employee placed in a GG-7 job after the

4. This test is not, as the majority suggests, majority op. at 8, impossible for the agency to meet. To argue that this standard is beyond the reach of agencies because they retain the authority to transfer work to an overstaffed facility, a remedy the majority concedes may well be "inefficient or otherwise undesirable" and, therefore "unreasonable", *id.*, ignores the context in which the statement appears. The preceding paragraph, indeed the whole of this opinion, argues for more deference to agency decisions so agencies can structure their workforces in the most efficient way. It is illogical to suggest, then, that the existence of an alternative that compounds the inefficiency of an unnecessary job would preclude the agency from carrying its burden.

5. The majority's doubts about the fairness and practicality of differentiating between replacement employees and others are groundless. Ordinarily it will not be difficult to identify who the replacement is. Where there is a one-to-one succession, of course, the replacement's identity is obvious. Where there have been multiple hires, the lowest-ranked or most recent hire would be the replacement because he would not have been hired had there been one less vacancy. The inquiry will be a factual one and no more difficult than many other questions we routinely deal with in compliance cases. Whether the replacement employee views himself as the appellant's replacement or not does not affect the fairness of treating him as such. The key point is that but for the agency's wrongful action against the appellant, he would not be holding the job.

appellant was removed should be considered, by virtue of that decision, wrongfully placed in a position to which the appellant was rightfully entitled.

Under these circumstances, the Board would be fully justified in putting the agency to the choice of removing or reassigning that person or creating another position for the appellant. Nor would such a decision work an injustice upon the appellant's replacement. For these reasons, I agree with the majority that the agency's failure to prove when it became overstaffed means that it has not carried its burden of proving compliance with the Board's order.

I also agree with the majority that the agency has not demonstrated why the appellant needed a "clean slate." Because this justification for the reassignment does not implicate the composition and structure of the agency's work force, the "overriding circumstances" test is appropriately applied to it.

Daniel R. Levinson
Daniel R. Levinson
Chairman

MAY 5 1993
Date