

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ROY McDIARMID, ET AL.)
)
 v.) Docket No. HQ12058410001
)
 UNITED STATES FISH AND)
 WILDLIFE SERVICE,)
 DEPARTMENT OF THE INTERIOR)
 _____)

ORDER

Roy McDiarmid, a Research Zoologist with the Fish and Wildlife Service, Department of the Interior, and Adrian Farmer, a Fish and Wildlife Biologist also with the Fish and Wildlife Service (FWS), have petitioned the Board to review FWS's implementation of certain Office of Personnel Management (OPM) regulations governing performance appraisals and merit pay determinations, specifically 5 C.F.R. § 430.203(d) and 5 C.F.R. § 540.104(d). Petitioners allege that, in violation of those regulations, their ratings on their performance appraisals were arbitrarily lowered solely because FWS had a policy of unlawfully applying a "bell curve" system in making its performance ratings of merit pay employees. They further allege that because of their lowered ratings they suffered a concomitant loss of merit pay. Petitioners request that the Board, pursuant to 5 U.S.C. § 1205(e)(2)(B), declare FWS's implementation invalid and order appropriate relief.

Title 5 C.F.R. § 430.203 sets forth regulations concerning the performance appraisal process. Section 430.203(d) provides that:

[a]n appraisal system shall not permit any pre-established distributions of expected levels of performance (such as a requirement to rate on a bell curve) that interfere with appraisal of actual performance against standards.

Regulations concerning the implementation of merit pay systems are located at 5 C.F.R. § 540.104. Section 540.104(d) provides that:

[n]o merit pay determination may take into consideration any pre-established or forced distribution of levels of performance among Merit Pay System employees.

Petitioners have submitted documentation to the Board, including internal memoranda, which they allege demonstrates that FWS's policy violated sections 430.203(d) and 540.104(d). Mr. McDiarmid asserts that his performance appraisal was changed from a level II to a level III, with a resulting loss in merit pay, solely because FWS decided that there should be no more than 35 percent level I and II ratings within his merit pay pool. Mr. Farmer states that for the same reason his performance rating was changed from a level II to a level III and his merit pay was reduced. For the reasons set forth below, we grant the petition for review.

Title 5 U.S.C. § 1205(e)(2)(B) provides that the Board may, in its discretion, upon petition of an interested party, review the implementation of an OPM regulation in order to determine if it has required the commission of a prohibited personnel practice. In determining whether to exercise this authority, the Board considers, among other things, the likelihood that a given issue will be reached in a timely fashion through ordinary channels of appeal, the availability of other equivalent remedies, the extent of the regulation's application to the Federal service, and the strength of the arguments against the validity of its implementation. Joseph v. Devine, MSPB Docket No. HQ12058110067 (June 30, 1982). After considering those factors, the Board GRANTS petitioners' request.

The validity of FWS's implementation of the regulations in question is not likely to be addressed in any other proceeding since employees cannot appeal their performance ratings to the Board, and authority exists which would preclude judicial consideration of the issue. Borrell v. U.S. International Communications Agency, 682 F.2d 981 (D.C. Cir. 1982), and Carducci v. Regan, 714 F.2d 171 (D.C. Cir. 1983). FWS's implementation of the regulations affects performance appraisals and merit pay determinations at a major division of a government agency. Moreover, the arguments presented by petitioners are supported by documentary evidence.

The central issue in this proceeding is whether FWS's implementation of the regulations in question has required the commission of a prohibited personnel practice. The Board is particularly interested in the views of the parties concerning whether FWS has employed "pre-established distribution of expected levels of performance" and, if so, whether FWS's implementation of 5 C.F.R. §§ 430.203 and 540.104 directly concerns a merit system principle set forth in 5 U.S.C. § 2301, since relationship to a merit system principle is a necessary element of a § 2302(b)(11) prohibited personnel practice. In addition, the parties should address the question of what remedies, including back pay, could be ordered for merit pay employees at FWS in the event FWS is found to have committed a prohibited personnel practice. This question is of concern to the Board because FWS's merit pay appropriation is a finite sum that may have been spent in its entirety. If it has, the issue arises as to whether there would be an appropriation available from which back pay could be awarded.

It is ORDERED that:

1. The respondent, United States Fish and Wildlife Service, Department of the Interior, shall file a brief and documentary evidence, as necessary, in response to the petition for review within 60 days from receipt of this ORDER. OPM may file a brief if it wishes to participate in this proceeding. Its brief must also be filed within 60 days from receipt of this ORDER;

2. Petitioners' reply, if any, to respondent's brief shall be filed within 10 days after petitioners' receipt thereof.

This Order shall be published in the Federal Register.

Interested persons may file comments at any time prior to the Board's determination in this matter; however, the Board cannot guarantee that it will be able to consider such comments unless they are received within 90 days from the date that the Order is published. All pleadings, briefs, and comments will be available for public inspection in the Office of the Secretary of the Merit Systems Protection Board.

FOR THE BOARD:

Feb. 8, 1984
(Date)

Washington, D.C.

Kathy W. Semone /oc
Robert E. Taylor
Secretary

CERTIFICATE OF SERVICE

I certify that copies of the foregoing ORDER were sent this date by mail to:

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Sept 5, 1984
(Dated)


Robert E. Taylor
Secretary

Washington, D.C.