UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

73 M.S.P.R. 476

Docket Number DC-0351-94-0776-I-2

MICHAEL B. BUCKLER, Appellant,

v.

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD, Agency.

Date: February 10,1997

Peter B. Broida, Esquire, Arlington, Virginia, for the appellant.

Elizabeth S. Woodruff, Esquire, Washington, D.C., for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Antonio C. Amador, Member

OPINION AND ORDER

The agency petitions for review, and the appellant cross petitions for review, of an initial decision that reversed the agency's action separating the appellant from his position pursuant to a reduction in force (RIF). For the reasons set forth below, we GRANT the agency's petition for review and the appellant's cross petition for review under 5 C.F.R. § 1201.115, and AFFIRM the initial decision, as MODIFIED by this Opinion and Order, still REVERSING the appellant's separation.

BACKGROUND

Effective August 22, 1994, the agency separated the appellant from his GM-15 Special Services Officer position pursuant to a RIF. Appeal File, MSPB Docket No. DC-0351-94-0776-I-1 (AF 1), Vol. 1, Tab 4, Subtabs 4, 8. The appellant timely filed an appeal of the RIF action, contending, inter alia, that: The RIF was not bona fide; the agency failed to afford him proper assignment rights; the action constituted reprisal for protected whistleblowing activity; and the action constituted age discrimination. AF 1, Vol. 1, Tab 1. He requested compensatory damages and a hearing in his appeal. *Id.* In subsequent pleadings, he amended his appeal to include a claim of sex discrimination and to assert that the RIF was not bona fide because it was a de facto adverse action or performance-based action. Appeal File, MSPB Docket No. DC-0351-94-0776-I-2 (AF 2), Vol. 2, Tab 16.

After affording the appellant his requested hearing, the administrative judge issued a February 29, 1996 initial decision in which he reversed the agency's action. Specifically, he found that the agency proved that it invoked the RIF regulations for a legitimate management reason, and that the RIF was not a de facto adverse action or performance-based action. Initial Decision (I.D.) at 5-13. He further found that the agency failed to properly afford the appellant his assignment rights, and that he was qualified for the GS-12 Thrift Savings Plan (TSP) Communications Specialist position encumbered by Sophie Dmuchowski and was entitled to bump into that position. I.D. at 13-25. In addition, the administrative judge determined that the appellant failed to show that the agency's action constituted reprisal for whistleblowing. I.D. at 25-32. The administrative judge further found that the appellant failed to establish a prima facie case of age or sex discrimination. I.D. at 32-34. The administrative judge ordered the agency to provide interim relief if a petition for review was filed. I.D. at 35.

The agency timely petitioned for review, contending that the administrative judge erred by finding that the appellant was entitled to bump into the TSP Communications Specialist position. Petition for Review (PFR) File, Vol. 1, Tab 5. The appellant timely responded in opposition to the petition for review. *Id.*, Tab 10.

The appellant timely cross petitioned for review, contending that the administrative judge erred by finding that the RIF was bona fide and that he had failed to prove his affirmative defenses of reprisal for whistleblowing and age and sex discrimination. He further asserts that the administrative judge erred by not permitting him to introduce evidence concerning his claim for compensatory damages. PFR File, Vol. 2, Tab 14. The agency timely responded in opposition to the cross petition for review.1 PFR File, Vol. 3, Tab 24.

ANALYSIS

<u>Interim relief and motion for sanctions</u>

In his initial decision, the administrative judge properly informed the parties that the deadline for filing a petition for review was April 5, 1996. I.D. at 35. Although the agency obtained an extension of time to file its petition for review, it nonetheless filed, on April 4, 1996, evidence of its compliance with the administrative judge's interim relief order. PFR File, Vol. 1, Tab 4. Specifically, the agency submitted an SF-52 and a letter from its Director of Personnel, Leonard B. Sese, to the appellant informing him that it had placed him in the TSP Communications Specialist position retroactive to the date of the initial decision. Sese's letter also informed the appellant that the agency had determined that his return to the workplace would be unduly disruptive and that he would be placed on administrative leave in a non-duty status pending the outcome of the petition for review. The agency's evidence was sufficient to establish a prima facie

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[1] As the appellant correctly asserts in an untimely pleading filed after the close of the record on review, *see* PFR File, Vol. 3, Tab 25, the final portion of the agency's response to the cross petition for review is actually a rebuttal to arguments raised in the appellant's response to the agency's petition for review. Therefore, we have not considered pages 34-42 of the agency's response to the appellant's cross petition for review.

case of compliance with the administrative judge's interim relief order. *See May v. Department of Veterans Affairs*, 57 M.S.P.R. 422, 424 (1993).

Thereafter, the appellant filed a timely motion to dismiss the agency's petition for review for the agency's alleged failure to comply with the administrative judge's interim relief order. PFR File, Vol. 1, Tab 8. In his motion, he made sworn, nonfrivolous allegations of noncompliance. Under such circumstances, we would ordinarily have ordered the agency to submit additional evidence and argument showing compliance. *See Avant v. Department of the Navy*, 60 M.S.P.R. 467, 473 (1994). However, before a show-cause order could be issued, the agency submitted evidence and argument concerning its compliance with the interim relief order. PFR File, Vol. 1, Tab 12. Because the appellant's allegations can be resolved on the basis of the existing record, we have determined that it is unnecessary to issue a show-cause order in this appeal.[2] *Avant*, 60 M.S.P.R. at 473.

In his motion to dismiss, the appellant asserts that the agency's attempts at compliance with the administrative judge's interim relief order are defective in three regards. First, he asserts that the agency's payment of interim salary was unduly delayed. PFR File, Vol. 1, Tab 9 at 8-14. According to his sworn statement, the appellant received his check on April 27, 1996, 23 days after the agency filed prima facie evidence of compliance with the administrative judge's interim relief order. *Id.* at 18. In a similar case, the Board has held that "the passage of 22 days from the issuance of an SF-50 to the issuance of a paycheck is not an unreasonably long period of time under the circumstances." *Salazar v. Department of Transportation*, 60 M.S.P.R. 633, 639 (1994). We see no material difference between this appeal and *Salazar* and we find that, under the circumstances,[3] the agency's delay is not unreasonable and does not constitute noncompliance with the interim relief order.

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[2] The appellant asserts that the agency's June 21, 1996 response to his motion to dismiss is untimely under 5 C.F.R. § 1201.116(a). PFR File, Vol. 2, Tab 16. In response, agency counsel notes that the Clerk had previously granted the appellant an extension of time until June 24, 1996 to file a cross petition for review and motion to dismiss. The appellant filed his motion to dismiss on May 20, 1996. In a sworn declaration signed under penalty of perjury, agency counsel attests that, when she received the appellant's motion to dismiss, she telephoned the Clerk and inquired whether the agency might file its response to the appellant's motion to dismiss with its response to the appellant's anticipated cross petition for review, and the Clerk responded that the agency might file its response at any time. PFR File, Vol. 2, Tab 18. The appellant does not challenge the declaration of agency counsel. Sworn statements that are not rebutted are competent evidence of the matters asserted therein. *See, e.g., Jordan v. Department of Justice*, 54 M.S.P.R. 609, 611 (1992). Thus, we find that the agency's response to the appellant's motion to dismiss is timely filed.

[3] In its response to the appellant's motion to dismiss, the agency explained the administrative process it went through to issue the disputed check. *See* PFR File, Vol. 1, Tab 12 at 5-6, Attachments B, C, D. The fact that the agency receives personnel and payroll services from the General Services Administration and does not handle payroll matters directly undoubtedly contributed to the reasonable delay in issuing the appellant his check.

Second, the appellant contends that the agency has not timely or completely restored his health insurance, retirement contributions, or sick and annual leave. PFR File, Vol. 1, Tab 9 at 6-7. In his sworn statement, the appellant asserts, inter alia, that he learned from his health insurance carrier that the agency had not restored his health insurance, he learned from the Thrift Savings Plan automated telephone service that the agency had not made contributions to his TSP account, and his pay and earnings statements reflected incorrect sick and annual leave balances. *Id.* at 18-20. As the agency correctly points out in its response to the appellant's motion to dismiss, the appellant's own documentary evidence shows that all proper deductions have been made for insurance and retirement contributions. PFR File, Vol. 1, Tab 9, Exhibit E-1. In addition, the agency has submitted sworn statements showing that the agency has properly restored the appellant's health insurance and retirement contributions, and that his official personnel records reflect the proper sick and annual leave balances. PFR File, Vol. 1, Tab 12, Attachment B at 3-4 and Exhibit 2, Attachment C at 2-3 and Exhibit 2, Attachment D at 2-3. The appellant does not dispute the agency's evidence or otherwise persist in his challenge in these matters. Thus, we find that the agency's unrebutted evidence shows that the agency has properly restored the appellant's health insurance, retirement contributions, and sick and annual leave, and that the agency is in compliance with the interim relief in this regard.

Third, the appellant asserts that the agency's undue disruption determination is unsupported and he asks the Board to dismiss the agency's petition for review based on the unsubstantiated nature of the agency's undue disruption determination. PFR File, Vol. 1, Tab 9 at 14-17. Under *King v. Jerome*, 42 F.3d 1371 (Fed. Cir. 1994), the Board lacks the authority to review an agency's undue disruption determination. *Jerome*, 42 F.3d at 1474-75; *see also, e.g., Scott v. Department of Justice*, 69 M.S.P.R. 211, 221 (1995); *Pencook v. U.S. Postal Service*, 67 M.S.P.R. 409, 414, *aff'd*, 73 F.3d 381 (Fed. Cir. 1995) (Table); *Griffin v. Department of the Army*, 66 M.S.P.R. 113, 116 (1995), *aff'd*, 78 F.3d 603 (Fed. Cir. 1996) (Table). Nevertheless, the appellant argues that the *Jerome* court only examined whether the Board may review an agency's undue disruption determination pursuant to its general enforcement authority under 5 U.S.C. § 1204(a)(2). He asserts that the court did not discuss whether the Board may review an agency's undue disruption determination pursuant to its statutory authority to issue protective orders under 5 U.S.C. § 1204(e)(1)(B)(i) or as a violation of merit systems principles.

Section 1204(e)(1)(B)(i) states, in relevant part:

The Merit Systems Protection Board may, ... during the pendency of any proceeding before the Board, issue any order which may be necessary to protect a witness or other individual from harassment....

The appellant alleges that an unwarranted undue disruption determination "may constitute harassment," PFR File, Vol. 1, Tab 9 at 15, but he does not even attempt to explain how the agency's undue disruption determination constitutes harassment in this particular case. Thus, he does not make the factual allegations necessary to support his legal argument.

Moreover, while the *Jerome* court did not explicitly consider the particular statute argued by the appellant, the court's language was unmistakably broad. The court held that:

> [T]here is no justification for the board to conduct a bad faith review in light of the precise statutory language and framework set out by Congress in section 7701(b)(2) [the interim relief statute]. The board cannot use section 1204(a)'s very general grant of authority to create a power of review where the statutory scheme indisputably contemplates no such power. By the language of the statute, Congress intended the agency to determine the effect of returning an employee to the workplace and gave it discretion when it determined that returning him would cause undue disruption. Congress did not provide for any review of this decision.

Jerome, 42 F.3d at 1374.[4] The court further held that the Board's review of an undue disruption determination "is limited to determining whether the agency actually made an undue disruption determination and whether the employee has received appropriate pay and benefits." *Id.* at 1375. In this appeal, the agency has made an undue disruption determination and the appellant is receiving appropriate pay and benefits. Under *Jerome*, our inquiry ends here. We find that the agency is in compliance with the administrative judge's interim relief order.[5]

We note that the agency has filed a motion for sanctions against the appellant. PFR File, Vol. 2, Tab 13. The agency asserts that the appellant's motion to dismiss the agency's petition for review for failure to provide interim relief was frivolous, vexatious, and filed in bad faith. *Id.* at 1. The appellant filed a lengthy response to the agency's motion for sanctions accompanied by a sworn statement of the appellant's counsel. PFR File, Vol. 2, Tab 17.

We agree with the agency that, as set forth above, the appellant's motion to dismiss for failure to provide interim relief was without merit and contrary to clear legal precedent from our reviewing court, but we see no evidence that the appellant's motion was filed in bad faith. Therefore, we find that sanctions are unwarranted under the

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[4] The Board had argued before the Federal Circuit in *Jerome* that it could review undue disruptions determinations under its general statutory authority pursuant to 5 U.S.C. § 1204(a)(2) to "order any Federal agency or employee to comply with any order or decision issued by the Board ... and enforce compliance with any such order." *Jerome*, 42 F.3d at 1374.

[5] Moreover, even if the Board were to issue a protective order in this case, such an order would not amount to the meaningful review of an undue disruption determination that the appellant seeks. Such an order is empty if the Board cannot enforce it; yet the *Jerome* court expressly held that the Board may not review an undue disruption determination in the guise of our statutory enforcement authority. The appellant's argument that the Board may review an undue disruption determination to determine whether it constitutes a violation of the merit system principles set forth at 5 U.S.C. § 2301(b) is similarly unavailing. The merit system principles are not self-executing and, under *Jerome*, the Board would be unable to enforce any hypothetical finding that a violation of merit system principles occurred. *See, e.g., Pollard v. Office of Personnel Management*, 52 M.S.P.R. 566, 569 (1992).

circumstances of this case. *See Hutchcraft v. Department of Transportation*, 60 M.S.P.R. 299, 304-05 (1994).

Bona fides

The administrative judge in his initial decision accurately set forth the following background facts, which are undisputed except where noted. In his Special Services Officer position, the appellant had three major areas of responsibility. He spent approximately forty percent of his time managing the Voice Recognition System (VRS), the agency's automated telephone inquiry system for TSP account holders. He spent approximately forty percent of his time managing the Definity system, the agency's internal telephone system. He spent the remainder of his time handling insurance matters.

In March 1993, the agency's Executive Director, Francis X. Cavanaugh, approved the transfer of the appellant's VRS responsibilities to the Office of Automated Systems (OAS), headed by John Witters. AF 2, Vol. 5, Agency Exhibit 50A. In December 1993, Cavanaugh approved a recommendation from Witters and Strat Valakis, the appellant's first-line supervisor and Director of the Office of Administration (OAD), to transfer the appellant's Definity responsibilities to OAS. AF 1, Vol. 2, Tab 4, Subtab 29a. Shortly thereafter, the appellant met with Cavanaugh and the two reached an agreement whereby Cavanaugh provided the appellant with a letter of recommendation and upgraded his most recent performance appraisal from "Fully Successful" to "Excellent," the appellant submitted a letter expressing his intent to seek other employment, and the agency agreed to take no personnel action resulting from the reorganization during the five-month period during which the appellant was seeking other employment. AF 1, Vol. 2, Tab 4, Subtabs 30, 31, 32; AF 2, Vol. 6, Agency Exhibits 67, 68, 69. Cavanaugh retired on January 31, 1994 and his successor was Roger E. Mehle. In February 1994, Mehle approved the abolishment of both the appellant's position and a vacant GS-5 position in the appellant's office, and the establishment of a GS-9 Computer Specialist position in OAS to absorb the appellant's Definity system duties. AF 2, Vol. 6, Agency Exhibit 56.

In March 1994, the appellant applied for a vacant GS-12 TSP Communications Specialist position and was referred to the selecting official, Veda Charrow, on a list of two best qualified candidates. AF 2, Vol. 3, Appellant Exhibit F. The other candidate, Sophie Dmuchowski, was selected for the position.

In April 1994, the appellant requested an extension from Valakis of the period during which he was to conduct his job search. Sese responded to the appellant's request via memorandum dated May 6, 1994, and informed the appellant that Valakis would consider an extension if the appellant submitted documentation of his efforts to find other employment. AF 1, Vol. 2, Tab 4, Subtab 23. When the appellant did not respond to Sese's memorandum, Sese sent the appellant a May 27, 1994 memorandum asking the appellant to state his intentions by June 10, 1994. AF 1, Vol. 1, Tab 4, Subtab 14.

Meanwhile, on May 23, 1994, the appellant and his counsel met with John J. O'Meara, then the agency's Assistant General Counsel and Ethics Officer, and made purported whistleblowing allegations. In a June 10, 1994 memorandum to Sese, the

appellant asserted that the agency's "interest in [his] departure ... suggests reprisal" for his alleged protected disclosures to O'Meara. AF 1, Vol. 1, Tab 4, Subtab 11. That same day, the agency informed the appellant that it would soon implement the planned RIF. *Id.*, Subtab 9. Soon thereafter, the agency issued the appellant a RIF notice informing him that his position was abolished, he had no assignment rights, and he would be separated effective August 22, 1994. *Id.*, Subtab 8.

The appellant, as noted above, contends that the RIF was a de facto adverse action or performance-based action and therefore not bona fide. A RIF may not be used as a disguised adverse or performance-based action to remove or demote a particular employee. *Gandola v. Federal Trade Commission*, 773 F.2d 308, 312 (Fed. Cir. 1985). An employee's allegation that the decision to abolish his position was improperly motivated goes directly to the question of the bona fides of the RIF. *Id.*

Here, the administrative judge carefully recounted undisputed evidence of record showing that the appellant had been viewed as a poor performer for several years prior to the RIF. I.D. at 6-8. The administrative judge noted that Valakis had in 1991 and 1992 attempted to rate the appellant's performance "Minimally Satisfactory" and place him on a performance improvement plan, but that his efforts were thwarted by Cavanaugh. *Id.* The administrative judge recited Valakis' testimony that concerns about the appellant's performance played a predominant role in the decision to transfer his VRS duties to OAS in March 1993. Valakis also testified that the primary reason for the transfer of the Definity duties to OAS in December 1993 was that it made sense organizationally for OAS to perform those duties since the Definity system entailed technology similar to that OAS already handled, although the appellant's performance was a secondary consideration in that decision. *Id.* at 8-9. The administrative judge thus found that the agency proved by a preponderance of the evidence that the RIF action was bona fide.

In his cross petition for review, the appellant challenges the administrative judge's findings in three respects. First, he asserts that the administrative judge failed to properly weigh the testimony of Valakis and Witters. Second, he contends that the administrative judge erred in a particular credibility finding. Third, he asserts that the administrative judge applied the incorrect legal standard. These arguments are unpersuasive.

The administrative judge correctly captured the tone and content of Valakis' testimony. Valakis readily and forthrightly conceded that the appellant's performance had been a problem. He admitted that the appellant's performance played a role in the decision to transfer the Definity system duties. Hearing Transcript, March 29, 1995 (Tr. 3) at 36, 178. He testified that the primary reason for transferring the Definity system duties was that OAS was in the better position to manage the system in light of anticipated changes in telecommunications technology. Tr. 3 at 36. He also testified that the Definity system was an automated system run by a computer and involved technology similar to that already being managed by OAS. Tr. 3 at 178.

Witters also testified that the question of which office was in the best position to manage the agency's telecommunications had been a topic of discussion for at least one year prior to the decision to transfer the Definity system responsibilities to OAS.

Hearing Transcript, March 27, 1995 (Tr. 1) at 36-37. He testified that he first discussed the issue with Valakis in approximately November 1993, but that he had discussed the matter with Cavanaugh prior to that. Tr. 1 at 36-37. He testified that the reason for his interest was that he had learned from trade publications that telecommunications technology was evolving and converging with the data services technology that OAS already handled and that it made sense for one office to handle both functions. Tr. 1 at 36-37, 42-43.

We see no merit to the appellant's contention that the administrative judge failed to appropriately consider this testimony. Indeed, the administrative judge explicitly discussed this testimony in his initial decision. I.D. at 8-9. That the administrative judge did not cite extensively to the transcript of Witters' testimony does not mean that he did not consider it. *See Marques v. Department of Health & Human Services*, 22 M.S.P.R. 129, 132 (1984), *aff'd*, 776 F.2d 1062 (Fed. Cir. 1985) (Table), *cert. denied*, 476 U.S. 1141 (1986). In any event, Witters' testimony entirely corroborated that of Valakis, namely that, while the appellant's poor performance was a consideration in the discussions as to how best to structure the agency's technology management, the primary reason for the reorganization was to place responsibility for managing similar technology in a single office.

Similarly, we discern no error in the administrative judge's credibility findings. In this regard, the administrative judge found not credible the appellant's testimony that Cavanaugh told him that the reason for the reorganization was his "frequent 'episodes' and 'personality things' with other staff members." I.D. at 11; *see* Hearing Transcript, April 17, 1995 (Tr. 6) at 110-11. Cavanaugh specifically testified that he never told the appellant that the reason for the reorganization was that he had difficulty getting along with other staff members. Tr. 1 at 217-18. As the administrative judge correctly noted, Cavanaugh testified that he told the appellant that he would likely be unsuccessful in obtaining other employment within the agency because of personality conflicts with some of the office directors. Tr. 1 at 221-22.

The appellant argues on review that the administrative judge erred by crediting Cavanaugh's testimony over the appellant's testimony. PFR File, Vol. 2, Tab 14 at 32-33. While the appellant asserts that the administrative judge's credibility finding is inadequately supported, he does not explain why he believes that the finding is incorrect. We note that it is not disputed that the appellant was a protégé of Cavanaugh; Cavanaugh recruited and hired him; Cavanaugh twice protected the appellant when Valakis attempted to rate his performance as "Minimally Satisfactory" and place him on a performance improvement plan; Cavanaugh agreed to postpone the planned reduction in force to afford the appellant time to obtain other employment. In short, all evidence of record indicates that Cavanaugh would be inclined to offer testimony favorable to the appellant. Further, Cavanaugh retired on January 31, 1994 and would appear to have no personal stake in the outcome of this appeal. Cavanaugh's testimony is consistent with the testimony of Valakis and Witters that the reason for the reorganization was to place similar technology under common management. The parties have proffered, and we discern, no motive on the part of Cavanaugh to misrepresent or distort the facts or to conceal facts which would be

favorable to the appellant, and we concur in the administrative judge's finding that Cavanaugh's testimony is more credible than that of the appellant.

The appellant also contends on review that the administrative judge erred by requiring him to prove that the sole reason for the RIF was concerns about the appellant's behavior and performance. PFR File, Vol. 2, Tab 14 at 33-40. The appellant suggests that the Board should, by analogy to *Gerlach v. Federal Trade Commission*, 9 M.S.P.R. 268, 274-76 (1981), and *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977), find that the RIF at issue in this appeal was not bona fide if concerns about the appellant's behavior and performance were a substantial or motivating factor in the decision to implement the RIF. He avers that the Board "has apparently not created a test of causation when RIFs are challenged as improperly motivated." PFR File, Vol. 2, Tab 14 at 37.

We discern no indication in the initial decision that the administrative judge impermissibly shifted the burden of proof on the bona fides of the RIF to the appellant. Moreover, the agency, not the Board, is responsible for deciding whether to retain or abolish particular positions. *Anderson v. Department of the Interior*, 48 M.S.P.R. 388, 390 (1991). As noted above, the record is clear that the primary motivation for the disputed RIF action was a legitimate management decision to reorganize. In *Anderson*, 48 M.S.P.R. at 392, the Board found that, where an agency shows that it decided to abolish positions for legitimate management reasons, its RIF is bona fide even though the employees affected by the RIF may have had performance- or misconduct-related problems. *See Bonn v. Department of the Navy*, 49 M.S.P.R. 667, 672-73 (1991), *aff'd*, 960 F.2d 155 (Fed. Cir. 1992) (Table). The administrative judge correctly relied upon *Anderson*, and we discern no principled basis for distinguishing *Anderson* from the case at hand.

In *Anderson*, the agency released the appellants from their competitive level after it abolished the motor pool. The agency presented evidence to show that the reason for the decision to abolish the motor pool was to achieve greater efficiency and significant cost savings. *Anderson*, 48 M.S.P.R. at 391-92. Prior to the RIF, the agency had certain unspecified "personnel problems" with the appellants. The Board in *Anderson* stated:

> The mere fact that the agency may have perceived that there were some problems in the past with the job performance or the physical capabilities of the incumbents of the motor pool positions does not, in itself, operate to prevent the agency from undertaking a legitimate reorganization to achieve greater efficiency and significant cost savings.

Anderson, 48 M.S.P.R. at 392; *see* I.D. at 10.

Here, although the agency had concerns about the appellant's performance and behavior, it had a legitimate reason for its RIF. There is no evidence of bad faith or an underhanded scheme to get rid of the appellant. *See Anderson*, 48 M.S.P.R. at 392; *see also Bonn*, 49 M.S.P.R. at 673. The appellant has proffered no persuasive reason why the Board should depart from precedent in this case and find that, despite the agency's legitimate management reason for the RIF, the RIF was not bona fide. Therefore, we find that the agency has proven by a preponderance of the evidence that

it invoked the RIF regulations for one of the legitimate management reasons set forth at 5 C.F.R. § 351.201(a)(2).

Assignment rights

The parties agree that, if the appellant is qualified for the GS-301-12 TSP Communications Specialist position encumbered by Dmuchowski, he is otherwise entitled to bump into that position. I.D. at 13-14. The administrative judge found that the appellant was qualified for the TSP Communications Specialist position because: He met the qualifications standards established by OPM for the 301 occupational series; he met the four knowledges, skills, and abilities (KSAs) for the position as set forth in the March 17, 1994 vacancy announcement for that position; and the agency failed to show that permitting the appellant to bump into that position would cause "undue interruption ... [or] loss of productivity beyond that normally expected in the orientation of any new but fully qualified employee" within the meaning of 5 C.F.R. § 351.702(a)(4) (1994). I.D. at 13-25.

In its petition for review, the agency challenges these findings in several respects. First, the agency asserts that its decision as to whether an employee is qualified for a position for purposes of determining his assignment rights in a RIF is entitled to deference, that the preponderance of the evidence standard applied by the administrative judge is inconsistent with such deference, and that the administrative judge erred by conducting a de novo review of the agency's qualifications determination. PFR File, Vol. 1, Tab 5 at 10-22.

The administrative judge, of course, had no authority to depart from the evidentiary standard employed by the Board in RIF appeals, and he correctly declined to do so. By statute, the Board may sustain the agency's action only if the action is supported by a preponderance of the evidence. 5 U.S.C. § 7701(c)(1)(B). Moreover, the agency's argument that its qualifications determination is entitled to deference is not supported by precedent.

In a RIF appeal, the Board conducts a de novo review to determine whether the agency has proven by a preponderance of the evidence that it properly applied the RIF regulations. The proper application of RIF regulations is a substantive right, not a mere procedural entitlement. *See, e.g., Markham v. Department of the Navy*, 66 M.S.P.R. 559, 563 (1995); *Schroeder v. Department of Transportation*, 60 M.S.P.R. 566, 577 (1994). An agency's burden of proving that it properly applied the RIF regulations includes a showing that it afforded the appellant his proper assignment rights. *See Schmidt v. Department of Transportation*, 18 M.S.P.R. 613, 614 (1984). This showing in turn requires the agency to show that the appellant is not qualified for purposes of assignment rights under 5 C.F.R. § 351.702(a).

Applying all of these principles in concert and based on a reading of the plain language of the disputed regulation, we find that, in a RIF appeal, the Board (and therefore, an administrative judge) must conduct a de novo review to determine whether the agency has shown by a preponderance of the evidence that:

[T]he employee ... [c]learly demonstrates on the basis of overall background, including recency of experience, a positive ability to successfully perform all critical

elements of the specific position upon entry into it, without undue interruption to that activity and without any loss of productivity beyond that normally expected in the orientation of any new but fully qualified employee.

See 5 C.F.R. § 351.702(a)(4) (1994). The clear language of the regulation does not require the Board to afford the agency's determination deference and, even assuming that it did, such deference would be inconsistent with the statutory preponderance of the evidence standard of review that the Board is obligated to apply in RIF appeals. Therefore, the administrative judge correctly declined to afford the agency's qualifications determination deference.

The agency also asserts on review that the administrative judge's finding that the appellant was qualified to perform the duties of the GS-301-12 TSP Communications Specialist position is incorrect. In particular, the agency asserts that the administrative judge erred by comparing the appellant's qualifications only against the four KSAs set forth in the March 17, 1994 vacancy announcement for the TSP Communications Specialist position rather than the seven KSAs set forth in the official position description of record for that position. PFR File, Vol. 1, Tab 5 at 23-25. An employee's qualifications for a position for the purpose of determining his RIF assignment rights must be determined as of the effective date of the employee's release from his competitive level. *See McMahon v. Department of the Army*, 21 M.S.P.R. 159, 162 (1984). By the same token, an official position description of record is the best evidence as to what KSAs the agency requires the incumbent of a position to possess. Thus, the administrative judge erred by considering only those KSAs set forth in the vacancy announcement. In other words, in addition to the four KSAs that the administrative judge considered, he should also have considered whether the appellant possessed the following skills:

Experience in collaborative development of materials and coordination of intra-agency review processes.

Experience in assessing information needs, developing functional program models, identifying strategies to achieve objectives, evaluating activities, and presenting conclusions and recommendations.

Experience in conducting survey research; skill in needs assessment and information collection through statistical, bibliographical, and anecdotal means.

AF 2, Vol. 3, Appellant Exhibit UU at 3.

This error did not, however, prejudice either party's substantive rights. The vacancy announcement and the position description are contemporaneous documents,[6] and there is no indication that the agency intended to abandon the three KSAs in the position description that are not also included in the vacancy announcement. The vacancy announcement, under the circumstances, constitutes

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[6] Veda Charrow signed the position description on March 3, 1994. Roger Mehle signed the position description on March 18, 1994. AF 2, Vol. 3, Appellant Exhibit UU. The vacancy announcement was issued on March 17, 1994. AF 2, Vol. 6, Agency Exhibit 90.

probative, persuasive evidence as to which KSAs the agency considered to be the most important KSAs required for the position and the administrative judge properly afforded those KSAs great weight. In particular, we note his finding that the agency found that the appellant was qualified for the position when he applied for it in March 1994, and that the agency referred him to the selecting official on a list of best qualified candidates. I.D. at 15. While the administrative judge correctly declined to afford the agency's March 1994 determination dispositive weight, he properly found that the agency's determination was relevant, persuasive evidence that the appellant was qualified for the position. *Id.* at 15, 20. Moreover, the agency proffered no evidence to meet its burden of proof concerning the appellant's experience in the three KSAs in the position description that were not included in the vacancy announcement.

We further find no merit to the agency's argument that the administrative judge's findings of fact concerning the appellant's qualifications are erroneous or that the administrative judge prevented the agency from introducing evidence showing that the appellant was not qualified for the TSP Communications Specialist position. As is evident from the initial decision, the administrative judge conducted an exhaustive review of the documentary evidence of record, painstakingly comparing the appellant's current and prior position descriptions, performance standards, and performance appraisals with the position description, vacancy announcement, and performance standards for the TSP Communications Specialist position. I.D. at 14-22. The administrative judge also considered testimonial evidence tending to show that the appellant lacked specific, detailed knowledge of the TSP and had a reputation as a poor writer.

Contrary to the agency's assertion on review, the appellant was only required to have a "[t]horough understanding of the principles and operations of the Thrift Savings Plan, or of similar 401(k) type plans." AF 2, Vol. 3, Appellant Exhibit UU at 3. This KSA does not require the appellant to have a detailed understanding of all of the specific nooks and crannies of the TSP program; he was only required to have a thorough understanding of TSP principles and operations <u>or of similar plans</u>. The administrative judge correctly found that the appellant possessed this generalized knowledge. I.D. at 20-21. The agency's assertion that it was precluded from introducing evidence showing that the appellant lacked detailed knowledge of specific aspects of the TSP program does not demonstrate error because the appellant was not required to possess such knowledge.

Likewise, the administrative judge considered evidence showing that the appellant had writing experience. The relevant KSA requires "skill and experience in writing and editing informational materials." AF 2, Vol. 3, Appellant Exhibit UU at 3. It does not require "skill plus," or unusual skill, or skill in producing high quality written products, as the agency seems to argue on review. PFR File, Vol. 1, Tab 5 at 31-34. The testimonial evidence cited by the agency on review that tends to show that the appellant was a poor writer was anecdotal at best and in general, the witnesses tended to have only a vague recollection as to the quality of the appellant's writing.

Veda Charrow testified that her "experience with [the appellant] was that he was not a very good writer," and that "it took him a very, very long time to produce a usable draft." Hearing Transcript, March 30, 1995 (Tr. 4) at 204, 211. She proffered general

testimony that the appellant's writing was poor and required editing, but she did not provide any specific details as to why his writing was poor. Tr. 4 at 211-18. Marcia Goldstein's testimony was substantially the same as Charrow's testimony. Hearing Transcript, March 31, 1995 (Tr. 5) at 12-14. Neither witness was able to identify specific flaws in the appellant's writing and the agency introduced no examples of the appellant's allegedly poor writing to buttress its claim that the appellant lacked writing skill. Under the circumstances, we are not persuaded by the agency's assertion that the administrative judge's findings of fact are erroneous. Therefore, we find that the appellant was qualified for the TSP Communications Specialist position and was entitled to bump into that position.

Whistleblower reprisal

The appellant contended below that the agency's action constituted reprisal for his alleged protected disclosure to John O'Meara that the agency should disclose the contents of a particular draft audit report[7] to its insurance underwriter in connection with a pending application for renewal of the agency's insurance policy. The administrative judge found in his initial decision that the appellant failed to show that he had a reasonable belief that his disclosure evidenced a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety. I.D. at 26-29. The administrative judge further found, in the alternative, that, even assuming that the appellant had a reasonable belief that his disclosure was protected, he failed to show that the disclosure was a contributing factor in the agency's action, and the agency showed by clear and convincing evidence that it would have taken the same action in the absence of the appellant's disclosure. I.D. at 29-32. The appellant alleges in his cross petition for review that these findings are in error. PFR File, Vol. 2, Tab 14 at 40-48. Assuming arguendo that the appellant had a reasonable belief that his disclosure constituted protected whistleblowing, we see no reason to disturb the administrative judge's alternative finding that the appellant failed to show that his disclosures were a contributing factor in the agency's action.

The appellant asserts in his cross petition for review that the RIF was not a fait accompli at the time of his May 23, 1994 disclosure to O'Meara and that is certainly true. PFR File, Vol. 2, Tab 14 at 46. The appellant's disclosure preceded the agency's formal issuance of a RIF notice. Nevertheless, the record in this appeal is clear that, in December 1993, Cavanaugh approved the reorganization and agreed to postpone any RIF for five months to afford the appellant the opportunity to seek other employment. After Cavanaugh's retirement, Mehle ratified the reorganization on February 26, 1994, and approved plans to go forward with the RIF at the end of the five-month postponement. AF 2, Vol. 6, Agency Exhibit 56.

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[7] The appellant alleged below that he made protected disclosures concerning an annuity contract, alleged abuse of telephone privileges, and the National Finance Center's operation of VRS, but the administrative judge found that these disclosures were not protected, I.D. at 29, and the appellant has not pursued these claims on review.

At the time of the appellant's disclosure on May 23, 1994, the end of the five-month postponement was drawing near. The appellant had already requested an extension of the postponement and had been asked to submit documentation of his attempts to find other employment before any extension would be granted. O'Meara testified that he did not take the appellant's alleged protected disclosure seriously because it appeared to him to be nothing more than an attempt to taint the coming RIF. Tr. 3 at 202-03, 207-08. Even O'Meara knew as early as December 1993 or January 1994 that the appellant's position was scheduled to be abolished. Tr. 3 at 206-07. The agency could have changed its mind and decided, either before or after the appellant's disclosure, not to conduct the RIF, but it was not required to do so merely because the appellant made an alleged protected disclosure. *See O'Shea v. Department of Transportation*, 65 M.S.P.R. 512, 515 (1994); *Moran v. Department of the Air Force*, 64 M.S.P.R. 77, 88 (1994); *Dean v. Department of the Army*, 57 M.S.P.R. 296, 303 (1993). Under the circumstances of this appeal we find that the appellant failed to show that his disclosure was a contributing factor in the agency's action and, therefore, we need not decide whether the agency showed by clear and convincing evidence that it would have taken the same action absent the appellant's alleged protected disclosure.

Age and sex discrimination

The administrative judge found, in reliance on Board precedent, that the appellant was required to show the following in order to establish a prima facie case of age and sex discrimination: (1) He is a member of a protected group; (2) he was similarly situated to an individual who was not a member of his protected group; (3) he was treated more harshly or disparately than the individual who was not a member of his protected group; and (4) the difference in treatment was based on an intent to discriminate. I.D. at 32; *see Richard v. Department of Defense*, 66 M.S.P.R. 146, 152 (1995); *Mascarenas v. Department of Defense*, 54 M.S.P.R. 303, 308 (1992). This rule of law dates back at least to the Board's decision in *Fenn v. Department of the Army*, 35 M.S.P.R. 362, 366 (1987). *Fenn* in turn relied on the decision of the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 93 S. Ct. 1817 (1973).

However, a closer reading of *McDonnell Douglas* reveals that the Court did not establish a rule of law requiring an employee to make a showing of discriminatory intent as part of his prima facie case. *McDonnell Douglas*, 93 S. Ct. at 1824. Moreover, subsequent Supreme Court decisions confirm that an employee need not make a showing of intent to establish a prima facie case of discrimination. *See O'Connor v. Consolidated Coin Caterers Corp.*, 116 S. Ct. 1307, 1309 (1996); *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2747 (1993). We find, therefore, that an appellant may establish a prima facie case of prohibited discrimination by introducing preponderant evidence to show that he is a member of a protected group, he was similarly situated to an individual who was not a member of the protected group, and he was treated more harshly or disparately than the individual who was not a member of his protected group. A showing of discriminatory intent is not required to establish a prima facie case of discrimination. To the extent that *Fenn* and its progeny are inconsistent with this holding, those decisions are hereby clarified.

Nevertheless, the Supreme Court has made it clear that it remains the appellant's ultimate burden of proof to show that the agency's reason for taking an alleged

discriminatory employment action is pretexutal. In this regard, the appellant must show both that the agency's purported reason for the action was false or not the real reason for the action, and that discrimination was the real reason for the action. *St. Mary's Honor Center*, 113 S. Ct. at 2752; *see, e.g., Boatman v. Department of Justice*, 66 M.S.P.R. 58, 63-64 (1994).

Here, the administrative judge found that the appellant failed to introduce evidence showing that the agency's action was based on discrimination and that all evidence of record showed that the agency's reasons for taking action were non-discriminatory in nature, although its determination concerning the appellant's assignment rights ultimately proved to be incorrect. I.D. at 33-34. The appellant does not challenge the administrative judge's findings of fact in this regard. Moreover, he does not identify evidence of discrimination that the administrative judge failed to consider, and we discern none in the record. Therefore, the administrative judge's error in requiring the appellant to prove intent as part of his prima facie case of discrimination did not prejudice the appellant's substantive rights because the appellant failed to carry his ultimate burden of proof of discrimination. Because the appellant has not proven his affirmative defenses of age and sex discrimination, he is not entitled to compensatory damages, and we will thus not consider his argument that the administrative judge erred by excluding evidence relevant to the compensatory damages issue.

ORDER

We ORDER the agency to cancel the appellant's separation and to place him in the GS-12 Thrift Savings Plan Communications Specialist position effective August 22, 1994. *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 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 agency about compliance.

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

NOTICE TO THE APPELLANT REGARDING FEES

You may be entitled to be reimbursed by the agency for your reasonable attorney fees and costs. To be reimbursed, you must meet the criteria set out at 5 U.S.C. §§ 7701(g) or 1221(g), and 5 C.F.R. § 1201.37(a). If you believe you meet these criteria, you must file a motion for attorney fees WITHIN 35 CALENDAR DAYS OF THE DATE OF THIS DECISION. Your attorney fee motion must be filed with the regional office or field office that issued the initial decision on your appeal.

NOTICE TO APPELLANT

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. *See* 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C.§ 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. See 42 U.S.C. § 2000e5(f); 29 U.S.C**.** § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court

has jurisdiction. See 5 U.S.C. §§ 7703(b)(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,
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 have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

For the Board
Robert E. Taylor, Clerk
Washington, D.C.