UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 162

Docket No. CH-0752-09-0227-I-1
CH-0752-09-0177-I-1
CH-0752-09-0178-I-1
CH-0752-09-0190-I-1
CH-0752-09-0192-I-1
CH-0752-09-0197-I-1
CH-0752-09-0208-I-1
CH-0752-09-0246-I-1

Mark J. Zajac, Keith D. Bertrand, Laura L. Grover, Lenore M. Blanton, Patrick A. Grover, Linda B. Lundy, Deborah L. Van Atta, and Patricia H. Williams,

Appellants,

v.

Department of Agriculture,

Agency.

August 27, 2009

Mark J. Zajac, Mason, Michigan, pro se.

Keith D. Bertrand, Haslet, Michigan, pro se.

Laura L. Grover, Morrice, Michigan, pro se.

Lenore M. Blanton, Howell, Michigan, pro se.

Patrick A. Grover, Morrice, Michigan, pro se.

Linda B. Lundy, Brighton, Michigan, pro se.

Deborah L. Van Atta, Fowlerville, Michigan, pro se.

Patricia H. Williams, Jackson, Michigan, pro se.

Ron Garland and Patsy J. Gallagher, Saint Louis, Missouri, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellants have filed petitions for review of the initial decisions dismissing their reduction in pay appeals. The appeals arose as a result of the same reassignment of all of the appellants from one locality pay area to another locality pay area with a lower rate of authorized locality pay. The legal arguments raised by the appellants are nearly identical, the law applicable to the arguments is the same, and the initial decisions in the appeals are based on the same legal reasoning. Thus, we have consolidated these petitions for review on our own motion because we find that consolidation will expedite the processing of theses cases and will not adversely affect the interests of the parties. 5 C.F.R. § 1201.36(a) and (b).

¶2 For the reasons discussed below, we find that the petitions do not meet the Board's criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY all of the petitions. However, we REOPEN these cases on our own motion under 5 C.F.R. § 1201.118, and AFFIRM the initial decisions AS MODIFIED by this Opinion and Order.

BACKGROUND

¶3 The material facts in these cases are not in dispute.[1] The appellants are employed with the agency's "Rural Development" office in Michigan. Initial Appeal File-0227 (IAF-0227), Tab 6, Subtabs 1, 4a. As a result of the agency's

[1] In this Opinion and Order, we will cite the record in the lead case, MSPB Docket No. CH-0752-09-0227-I-1, to extent that all of the case records contain the same information or documents.

"Michigan Business Plan," the agency relocated its Howell, Michigan Rural Development office into agency occupied office space in Mason, Michigan. *Id.*, Subtab 1 at 1, Subtab 4b. The agency informed the appellants in November 2008 of their reassignments to their new official worksite effective November 23-24, 2008. *Id.*, Subtab 4b. The agency also notified the appellants that their General Schedule (GS) grade and step would remain the same, but that their locality pays would be decreased. *Id.* The SF-50s documenting the appellants' reassignments to their new official worksite show that their locality pay was reduced to the amount of locality pay authorized for their new official worksite. *Id.*, Subtab 4a.

¶4 The appellants filed appeals asserting that, as a result of a management action reassigning them to the new locality pay area, they had suffered a reduction in pay and a denial of pay retention. IAF-0227, Tab 1. The appellants did not dispute that their grades and steps remained unchanged, nor did they challenge the agency's calculation of the amount of locality pay authorized for their new official worksite. *Id.* The administrative judge (AJ) informed the appellants of the scope of the Board's jurisdiction in reduction in pay cases and of their burden to establish the Board's jurisdiction in such cases. The AJ ordered the appellants to file evidence and argument establishing the Board's jurisdiction. IAF-0227, Tab 2. The agency asserted that it had lawfully set the appellants' pay in accordance with the locality pay authorized for the appellants' new official worksite as required by law. IAF-0227, Tab 6, Subtab 1.

¶5 In the initial decisions, the AJ found that as a result of the Federal Workforce Flexibility Act of 2004, Congress had statutorily defined the term "rate of basic pay" for the purposes of the grade and pay retention statutes, and that, in May 2005, the Office Personnel Management (OPM) revised the definition of the term "rate of basic pay" under 5 C.F.R. § 531.203 (2008), with the result being that both the statutory and regulatory provisions now include

locality pay within those definitions.[2] IAF-0227, Tab 7 at 3-4. The AJ found that the Board could now have jurisdiction over a reduction in pay appeal regarding locality pay because 5 C.F.R. § 752.402(f) defines "pay" in terms of "rate of basic pay," and 5 C.F.R. § 531.203 (2008) now specifically defines the term "rate of basic pay" as including locality pay. *Id.* However, the AJ found that the first inquiry in determining whether the Board has jurisdiction over the appellants' claims of a reduction in pay is which locality pay the appellants are lawfully entitled to in their new official worksite. *Id.* at 4. The AJ reviewed OPM's locality rate pay-setting regulation and determined that the appellants are only lawfully entitled to the locality pay established for their new official worksite; they are not lawfully entitled to the locality pay of their former official worksite. *Id.* at 4-5. Thus, the AJ concluded that, if the agency had failed to adjust the appellants' pay to reflect the locality pay for their new official worksite, the appellants' rates of basic pay would have been contrary to law or regulation. *Id.* at 5. Additionally, the AJ noted that, even if the application of OPM's locality pay-setting regulation (5 C.F.R. § 531.609 (2008)) was in doubt, 5 C.F.R. § 531.611(d) (2008) specifically provides that the reduction or termination of a locality rate under § 531.609 is not an adverse action for the purposes of the Board's jurisdiction under 5 C.F.R. part 752. *Id.* at 5-6. The AJ also found that the appellants are not entitled to pay retention because they did not go from one pay schedule to another pay schedule as a result of their reassignments to their new official worksite. *Id.* at 3 n.1. Thus, the AJ found that the appellants had not

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[2] We note that OPM has further amended its grade and pay regulations, effective December 8 and 18, 2008, after the effective date of the agency's action reassigning the appellants in these cases. *See* 73 Fed. Reg. 66143 and 73 Fed. Reg. 76847. As the AJ properly did below, we have applied in this Opinion and Order the version of OPM's regulations that were in effect at the time of the agency's action. *See Burge v. Department of the Air Force*, 82 M.S.P.R. 75, ¶ 12 n.3 (1999) (the applicable regulations are those regulations that were in effect at the time of the agency's action).

been the subject of a reduction in pay within the Board's jurisdiction and he dismissed the appeals for lack of jurisdiction. *Id.* at 1, 6.

¶6 The appellant in the lead case has filed a petition for review and the other appellants have either filed a copy of that petition, have requested that their cases be consolidated with the lead case on review, or have simply requested that the Board review the initial decision. Petition for Review File-0227 (PFRF-0227), Tab 1. The agency has not filed a response in any of the cases.

ANALYSIS

¶7 We grant petitions such as these only when significant new evidence is presented to us that was not available for consideration earlier or when the AJ made an error interpreting a law or regulation. *See* 5 C.F.R. § 1201.115. After fully considering the filings in these consolidated cases, we conclude that there is no new, previously unavailable, evidence and that the AJ made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Accordingly, we DENY the appellants' petitions for review.

¶8 However, we reopen these appeals on our own motion to further consider the appellants' argument that they have suffered a reduction in pay because they are entitled to mandatory pay retention. The issue of the Board's jurisdiction is always before the Board and may be raised by either party or sua sponte by the Board at any time during a Board proceeding. *See Edwards v. Department of State*, 98 M.S.P.R. 481, ¶ 4 (2005). The existence of Board jurisdiction is a threshold issue in adjudicating an appeal. *See Giove v. Department of Transportation*, 89 M.S.P.R. 560, ¶ 8 (2001), *aff'd*, 50 F. App'x 421 (Fed. Cir. 2002).

¶9 The Board generally has jurisdiction over an employee's reduction in pay. *See* 5 U.S.C. §§ 7512(4), 7513(d); *Kile v. Department of the Air Force*, 104 M.S.P.R. 49, ¶ 16 (2006). Congress has defined "pay" to mean "the rate of basic pay fixed by law or administrative action for the position held by an employee."

See 5 U.S.C. § 7511(a)(4). Congress has defined "rate of basic pay" for the purposes of the grade and pay retention statutes to mean:

> (A) the rate of basic pay payable to an employee under law or regulations before any deductions or additions of any kind, but including--
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> > (i) any applicable locality-based comparability payment under section 5304 or similar provision of law;
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> > (ii) any applicable special pay under section 5305 or similar provision of law; and
> >
> > (iii) subject to such regulations as [OPM] may prescribe, any applicable existing retained rate of pay established under section 5363 or similar provision of law; and
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> (B) in the case of a prevailing rate employee, the scheduled rate of pay determined under section 5343.

5 U.S.C. § 5361(4). An employee may be entitled to pay retention where the employee's former rate of basic pay is greater than the maximum rate of basic pay payable for the grade of the employee's position immediately after the occurrence of, among other circumstances, a management action that places an employee under a different pay schedule. *See* 5 U.S.C. § 5363(a)(3), (b)(2)(A); 5 C.F.R. § 536.301(a)(4) (2008). The appellants reassert on review, in effect, that the agency erred in failing to accord them mandatory pay retention in the amount of their former rate of locality pay, as allegedly required under OPM's implementing pay retention regulations, specifically 5 C.F.R. §§ 536.101, .103, and .301(a) (2008), because locality pay is now included in the definition of "rate of basic pay" under 5 U.S.C. § 5361(4) and 5 C.F.R. § 536.103 (2008). PFRF-0227, Tab 1 at 5. In effect, the appellants assert that, as a result of a management action reassigning them to a new official worksite under a covered pay system with a different pay schedule that has resulted in a reduction of their payable rate of basic pay, which includes locality pay, they are entitled to mandatory pay retention. *Id.*

¶10 The AJ rejected this claim as legally meritless because the appellants had not, as a result of their reassignments, changed from one pay schedule to another pay schedule, given that the appellants had remained under the GS pay system in their new official worksite. IAF-0277, Tab 7 at 3 n.1. Although the AJ's reasoning appears to misapprehend the difference between a "covered pay system" and a "pay schedule," *see* 5 C.F.R. § 536.103 (2008), for the reasons set forth below, we find that the AJ's reasoning has not affected the appellants' substantive rights because the AJ correctly determined that the appellants had failed to assert nonfrivolous allegations of a right to pay retention and, thus, that the Board does not have jurisdiction over these cases.

¶11 OPM's pay retention regulations provide, in pertinent part, that:

> Under 5 U.S.C. 5363, an employee whose rate of basic pay otherwise would be reduced as a result of a management action is entitled to retain his or her rate of basic pay *under the circumstances prescribed in this part.*

5 C.F.R. § 536.101 (2008) (emphasis added). "Management action" is defined, in part, to mean "an action (not for personal cause) by an agency official not initiated or requested by an employee which may adversely affect the employee's grade or rate of basic pay." 5 C.F.R. § 536.103 (2008). Further, 5 C.F.R. § 536.301(a) (2008) provides, in part, that:

> (a) Subject to the requirements in § 536.102 and this section, an agency must provide pay retention to an employee in a position under a covered pay system whose payable rate of basic pay otherwise would be reduced (*after application of any applicable geographic conversion under* § 536.303(a)) as a result of—
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> . . .
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> (4) A management action that places an employee under a different *pay schedule*.

5 C.F.R. § 536.301(a)(4) (2008) (emphasis added). "*Pay schedule* means a set of rate ranges established under a single authority—*i.e.*, the General Schedule . . . ." 5 C.F.R. § 536.103 (2008). The GS locality rate schedules established under 5

U.S.C. § 5304 are a form of pay schedule. 5 C.F.R. § 536.103 (2008) (definition of "pay schedule"). Each geographically-based GS locality rate schedule has a set of rate ranges established in accordance with requirements set forth in 5 U.S.C. § 5304. It is undisputed that the appellants' salaries have been set using the GS locality rate schedules. IAF-0227, Tab 6, Subtabs 4a, 4b. Thus, under the circumstances of these cases, the appellants were potentially entitled to pay retention because they were reassigned through a management action from a higher GS locality rate schedule to a lower GS locality rate schedule and their rates of basic pay, which include locality pay, were thereby reduced.

¶12 However, 5 C.F.R. § 536.301 (2008) also provides that:

> (b) If an employee's official worksite changes in conjunction with an action that *may* entitle the employee to pay retention under paragraph (a) of this section, the agency must apply the geographic conversion rule in § 536.303(a) *before* determining whether an employee's rate of basic pay otherwise would be reduced.

5 C.F.R. § 536.301(b) (2008) (emphasis added). Section 536.303(a) (2008) provides:

> (a) *Geographic conversion at time of action that may provide initial entitlement to pay retention*. If, in conjunction with a pay action that may entitle the employee to pay retention under §§ 536.301 or 536.302, an employee's official worksite is changed to a new location where different pay schedules apply, the agency must convert the employee's rate(s) of basic pay to the applicable pay schedule(s) in the new location before applying the pay retention rules in this subpart or any other simultaneous pay action (other than a general pay adjustment). The agency must identify the highest applicable rate range that would apply to the employee's position of record before the pay action as if that position were stationed at the new official worksite and determine the employee's converted payable rate of basic pay based on the step (or rate) in that range that corresponds to the employee's step (or rate) before the pay action. A reduction in an employee's payable rate of basic pay resulting from this geographic conversion is not a basis for entitlement to pay retention. The pay retention rules in this subpart must be applied as if the employee's payable rate of basic pay after geographic

> conversion is the employee's existing payable rate of basic pay in effect immediately before the action.

¶13 The appellants do not dispute the agency's assertion that their pay locality areas went from the "Detroit-Warren-Flint, Michigan" pay locality area for their former official worksite to the "Rest of U.S." pay locality area for their new official worksite.[3] IAF-0277, Tab 6, Subtab 1 at 3. Regarding the appellant in this lead case, Mark Zajac, it is undisputed that his GS-11, Step 9 rate of basic pay went from $74,729 to $69,026 as a result of the change in his official worksite and applicable pay locality area. *Id.*, Subtab 4. Applying the above noted geographic conversion rule, Mr. Zajac's "existing payable rate of basic pay in effect immediately before the action," was therefore $69,026, the rate of basic pay for GS-11, Step 9 under the "Rest of U.S." pay locality area. *See* 5 C.F.R. § 536.303(a) (2008); *see also* 5 C.F.R. § 536.304(a)(3) (2008).

¶14 The issue of eligibility for pay retention is then determined by 5 C.F.R. § 536.304(b) (2008), which, in pertinent part, provides:

> (b) *Determining initial pay retention entitlement*. When an employee becomes entitled to pay retention under § 536.301 or [§] 536.302, the agency must determine the employee's pay retention entitlement under the following rules (subject to the requirements in paragraph (a) of this section):
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> > (1) If an employee's existing payable rate of basic pay is less than or equal to the maximum rate of the highest applicable rate range for the grade of the employee's position of record immediately after the event causing the pay retention entitlement, the employee is entitled to the lowest rate of basic pay in such rate range that equals or exceeds the employee's existing payable rate of basic pay. If an employee's payable rate of basic pay is set at or below the maximum rate of the highest applicable rate range, pay retention under this subpart ceases to apply to the employee.

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[3] OPM's 2008 pay locality tables for the "Detroit-Warren-Flint, Michigan" and "Rest of U.S." pay locality areas can be found at http://www.opm.gov/oca/08tables/html/det.asp and http://www.opm.gov/oca/08tables/html/RUS.asp respectively.

"*Rate range* or *range* means the range of rates of basic pay for a grade within an established pay schedule, excluding any retained rate." 5 C.F.R. § 536.103 (2008).

¶15 The "rate range" for GS-11 under the "Rest of U.S." pay locality area runs from $54,494 to $70,843. Mr. Zajac's $69,026 "existing payable rate of basic pay in effect immediately before the action" was less than the "maximum rate of the highest applicable rate range for the grade of the employee's position of record immediately after the event causing the pay retention entitlement," $70,843, and thus Mr. Zajac was only entitled to "the lowest rate of basic pay in such rate range that equals or exceeds the employee's existing payable rate of basic pay." *See* 5 C.F.R. §§ 536.303(a) and .304(b)(1) (2008). Because Mr. Zajac's "existing payable rate of basic pay in effect immediately before the action" was $69,026, *see* 5 C.F.R. § 536.303(a) (2008), that is the rate of basic pay he is entitled to under 5 C.F.R. § 536.304(a)-(b) (2008). Because that payable rate of basic pay is "below the maximum rate of the highest applicable rate range, pay retention under this subpart *ceases to apply to the employee*." *See* 5 C.F.R. § 536.304(b)(1) (2008) (emphasis added). Accordingly, Mr. Zajac did not assert nonfrivolous allegations of fact that, if proven, could show that the Board has jurisdiction over his claim of a reduction in pay and, thus, the AJ properly dismissed his appeal for lack of jurisdiction.

¶16 The seven remaining appellants are also under the GS pay schedule. We have applied the above legal analysis to each of those appellants' uncontested salary information and have determined that their "existing payable rate[s] of basic pay in effect immediately before the action" were "at or below the maximum rate of the highest applicable rate range" under the GS schedule for the "Rest of U.S." pay locality area applicable to their new official worksite and, thus, we find that the remaining appellants were not entitled to pay retention as well. Accordingly, we find that the remaining appellants have also failed to assert nonfrivolous allegations of fact that, if proven, could show that the Board has jurisdiction over their claims of a reduction in pay

and, thus, that the AJ properly dismissed all of these consolidated cases for lack of jurisdiction.

ORDER

¶17 We AFFIRM the initial decisions AS MODIFIED by this Opinion and Order. This is the final decision of the Merit Systems Protection Board in these consolidated appeals. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. 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 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the

court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.