UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 91

Docket No. NY-4324-09-0336-X-1

Darrell T. Crawford,
Appellant,
v.
Department of the Army,
Agency.

September 30, 2011

Steven L. Herrick, Esquire, Washington, D.C., for the appellant.

James Mercer, Esquire, New York, New York, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 This petition for enforcement is before the Board based on the administrative judge's Recommendation finding the agency in noncompliance with a final Board order. MSPB Docket No. NY-4324-09-0336-C-1, Compliance File (CF), Tab 5. For the reasons set forth below, we find the agency is now in compliance. In brief, the agency has satisfied its obligation under 38 U.S.C. § 4313(a)(2) to place the appellant in a position of like status to his prior position. We therefore DISMISS the appeal as MOOT.

BACKGROUND

Procedural History

¶2 The underlying appeal concerns the agency's obligations under the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at 38 U.S.C. §§ 4301-4333) (USERRA). MSPB Docket No. NY-4324-09-0336-I-1, Initial Appeal File (IAF), Tab 1, Tab 24 Initial Decision (ID) at 1-2. In April 2006, at the time the appellant departed for uniformed service, he was an Information Technology (IT) Specialist, GS-2210-11, in the Army Corps of Engineers' New York District's Information Management Office. ID at 2-3. The appellant performed uniformed service from April 2006 until about May 29, 2008. ID at 3. As discussed in the next section, during the appellant's absence, the agency underwent a competitive sourcing in which the appellant's position was abolished. *Id*. Upon the appellant's return from uniformed service, on May 30, 2008, the agency returned him to his position of IT Specialist. ID at 4. However, on June 8, 2008, the agency reassigned him to the position of Program Support Specialist, GS-0301-11. *Id*.

¶3 The appellant filed a Board appeal challenging this reassignment, alleging that the Program Support Specialist position was not of like status to his prior position of IT Specialist under 5 C.F.R. § 353.209(a), and that the agency had therefore violated 5 U.S.C. § 4313(a)(2). IAF, Tab 1 at 9, Tab 13 at 2-4. The administrative judge granted the appellant's request for corrective action, ordering the agency to search throughout the Department of the Army to identify and place the appellant in a position of like status to his position of IT Specialist, effective retroactive to May 30, 2008. ID at 11. The administrative judge also ordered, pursuant to 5 C.F.R. § 353.110(a), that if the agency determined that no appropriate positions were available or if it was otherwise impossible or unreasonable to reassign the appellant, then the agency should notify OPM and thus provide the appellant with an opportunity to apply to the Office of Personnel Management (OPM) for placement assistance. *Id*. The administrative judge's

order became final on March 31, 2010, when neither party filed a petition for review. ID at 12.

¶4 Thereafter, the agency submitted a notice of compliance asserting it had attempted without success to find the appellant a position of like status and had requested OPM's placement assistance. IAF, Tab 25 at 1. On May 21, 2010, the appellant filed this petition for enforcement, contending that the agency provided insufficient details of the actions it took to search for another position of employment for him, and that the search, "apparently limited to vacant positions," should have included all positions of like status or the "next best" available position, "whether occupied or not." CF, Tab 1 at 3-5. On July 13, 2010, the administrative judge granted the petition for enforcement, finding that the agency's search was too narrow "in that it focused on only vacant positions." CF, Tab 5 at 6. The administrative judge recommended that the agency conduct an agency-wide search for a position of like status "even if such a position is currently occupied by another." CF, Tab 5 at 9.[1] Accordingly, this matter was referred to the Board to bring the agency into compliance.

¶5 The agency subsequently reassigned the appellant from his Program Support Specialist position to a position with the same title and duty station as

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[1] Because we find that the appellant's current position is of like status to his prior position, we do not decide whether the agency would have been obligated to displace an existing employee from his or her position, even if such a position were *not* the slot that the appellant vacated to perform his uniformed service. However, we note that such a holding would require an extension of the principle behind the case relied upon by the administrative judge, *Nichols v. Department of Veterans Affairs*, 11 F.3d 160 (Fed. Cir. 1993). There, the court observed, "Although occupied by [another person], Nichols' former position is not unavailable." *Id.* at 163. The instant situation does not fit the mold of *Nichols*, because the former position was abolished and is therefore unavailable. As to such a situation, another court recently distinguished between "bumping" an employee who was hired merely to fill a service member's slot, and bumping an employee on routes entirely different from the ones the service member drove, and on routes to which he would not have been entitled had he been continuously employed. *Hogan v. United Parcel Service*, 648 F. Supp. 2d 1128, 1143 n.5 (D. Miss. 2009) (service member's position had been eliminated during his military service).

the position he occupied prior to his absence for uniformed service, i.e., IT Specialist, GS-2210-11, at his former facility. Compliance Referral File (CRF), Tab 2 at 3. The parties agree that the duties of the appellant's new position are not identical to his previous position, but dispute whether the position is nonetheless of like status to his prior position. CRF, Tab 13 at 8. The appellant contends the position is not of like status, and therefore asks the Board to adopt the administrative judge's recommendation and order the agency to conduct a new search for all positions – both vacant and occupied – of like status, agency-wide, i.e., throughout the Department of the Army. CRF, Tab 4 at 11, 13, 15.

Abolishment of the Appellant's Prior Position

¶6 The administrative judge developed several stipulations and gave the parties the opportunity to submit evidence and argument. IAF, Tabs 2, 4, 14. After the appellant waived his right to a hearing, the administrative judge issued an initial decision based on the written record. ID at 2, Tab 19, Status Conference Compact Disc. The initial decision made several important findings of fact about the abolition of the appellant's IT Specialist position that the parties have not disputed in their subsequent submissions. ID at 2-4. We therefore adopt the administrative judge's fact findings.

¶7 In 2004, while the appellant was serving as an IT Specialist, the Army Corps of Engineers initiated an action under the Office Management and Budget Circular A-76 program to competitively source information management/information technology (IM/IT) functions within the continental United States. ID at 2-3. IM personnel were advised of this initiative. *Id*.

¶8 On June 21, 2006, during the appellant's absence to perform uniformed service, the agency made a selection under the A-76 program, causing many of the Corps of Engineers' information technology responsibilities to be contractually awarded to Lockheed Martin. ID at 3. Thereafter, prior to the appellant's return from uniformed service in 2008, the agency abolished the appellant's position and formed a new organization called the Army Corps of

Engineers-Information Technology (ACE-IT). *Id*. The creation of this new organization was neither a transfer of function nor a joint venture. *Id*. n.3. The mission of ACE-IT is to provide IM/IT services to all agency offices in the United States. ID at 3. The agency no longer performs the IM/IT services in which the appellant was involved prior to his military activation, since those services are currently being performed by Lockheed Martin employees who are not federal employees. ID at 3-4; *see also* IAF, Tab 14, stipulation 10.

¶9 In April 2007, new positions were created, and ACE-IT and Lockheed Martin began recruiting employees to complete the work. *Id*. After the reorganization, some of the former IM employees were hired by ACE-IT via a competitive selection process in which the Corps of Engineers' New York District did not participate. *Id*. Those employees not hired by ACE-IT were transferred, with their consent, to non-IM/IT positions in other offices within the New York District. *Id*. The appellant's new IT Specialist position is within ACE-IT. CRF, Tab 2 at 3.

ANALYSIS

¶10 The crux of this case is whether the appellant's new IT Specialist position is of like status to the IT Specialist position he occupied before he left for uniformed service. Under 5 U.S.C. § 4313(a)(2), the agency is required to reemploy the appellant in accordance with the following order of priority:

> (A) in the position of employment in which the person would have been employed *if the continuous employment of such person with the employer had not been interrupted by such service*, or a position of *like seniority, status and pay, the duties of which the person is qualified to perform;* or
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> (B) in the position in which the person was employed on the date of the commencement of the service in the uniformed services, or in a position of like seniority, status and pay, the duties of which the person is qualified to perform, only if the person is not qualified to perform the duties of a position referred to in subparagraph (A) after *reasonable efforts by the employer to qualify the person.*

5 U.S.C. § 4313(a)(2)(A)-(B) (emphases added). USERRA's regulations specify that if the employee's position is abolished during such absence, the agency must reassign the employee to another position "of like status, and pay." 5 C.F.R. § 353.209(a). "Status" is defined as "the particular attributes of a specific position . . . includ[ing] the rank or responsibility of the position, its duties, working conditions, pay, tenure, and seniority." 5 C.F.R. § 353.102.

The appellant qualifies for the new position.

¶11 When the agency places a person in a position of like status pursuant to 5 U.S.C. § 4313(a)(2)(A), it must be a position "the duties of which the person is qualified to perform." The statute, however, contemplates that a person may not be *initially* qualified to perform the new position, in its requirement that the agency make "reasonable efforts" to qualify the person. 5 U.S.C. § 4313(a)(2)(B).

¶12 The agency submitted a sworn affidavit from Wardwell Leo, the IT Chief for ACE-IT, who was the second-level supervisor of the appellant from 1990 until he was deployed in 2006, and is again in the appellant's chain of supervision. CRF, Tab 12, subtab L at 2, 3, 5. Leo's affidavit declared that the new position's duties "require little or no formal training." *Id.* at 4. The agency maintains that the appellant further demonstrates he qualifies for the position by his already satisfactory performance in the position, and the agency provides as evidence the appellant's performance appraisal for the period of July 4, 2010, through January 31, 2011. CRF, Tab 12, subtab K. Thus, the agency contends that the appellant qualifies for his new position. CRF, Tab 12 at 19.

¶13 The appellant's brief, in opposition, contends he has "not been permitted to perform any of the duties of his new position because he has not yet been sent to Mississippi to become qualified to do so." CRF, Tab 13 at 11. His affidavit explains further that he is "still waiting to be sent to Vicksburg, Mississippi for formal training." *Id.* at 39. Thus, the appellant contends, the agency has failed to prove that he qualifies for the new position. *Id.* at 11.

¶14 We find the appellant qualifies for his new position. First, the appellant's statements provide no detail in asserting that he has not yet been permitted to perform "any" of the duties of his new position. Nor does the appellant rebut the agency's evidence that he has performed satisfactorily under the new position, or any of the IT Chief's multiple statements that the new position is the appellant's "present" position. CRF, Tab 12, subtab L at 4-5 (paragraphs 25, 27, 28, 29). Second, the appellant's statements seem to acknowledge that after he obtains the Vicksburg training for which he is currently "waiting," there will not be "any of the duties of his new position" that he will not be qualified to perform. CRF, Tab 13 at 11, 39. Third, the appellant does not point to anything that would tend to disqualify him from the position.

¶15 Fourth, although not dispositive to our finding that the appellant qualifies for the new position, we note there is no indication that the additional training allegedly required for his position is onerous. The appellant highlights the IT Chief's statement that "[a]t the very most, Mr. Crawford should be able to perform all the duties of the [new] position with a few days of training, either formal or on-the-job." CRF, Tab 13 at 11. The appellant does not dispute the truth of the IT Chief's statement, but instead only asks, "If Mr. Leo believes the Appellant is qualified, why does he also believe that he needs training to perform the duties of the position?" *Id.* The appellant's question misunderstands that section 4313(a)(2)(A) allows an agency to make "reasonable efforts" to qualify a person. We find no dispute that to the extent the appellant might not already be fully qualified for his new position, he can become fully qualified with minimal additional training. Therefore, we find the appellant qualifies for the new position. We remind the agency of its obligation to provide the appellant any training required for his position.

The appellant's new IT Specialist position is of like status to the IT Specialist position he occupied prior to his military absence.

Definition of "like status"

¶16 The agency has an obligation to reemploy the appellant in the same position he would have occupied had his continuous employment not been interrupted by uniformed service, or in a position of like seniority, status, and pay. 38 U.S.C. § 4313(a)(2)(A). Here, the agency abolished the appellant's position while he was providing uniformed service and, therefore, the option of returning the appellant to the position he would have held is not available. Thus, the agency must restore the appellant to a position of like status to his original position. 38 U.S.C. § 4313(a)(2)(A); 5 C.F.R. § 353.209(a).

¶17 "Status means the particular attributes of a specific position. This includes the rank or responsibility of the position, its duties, working conditions, pay, tenure, and seniority." 5 C.F.R. § 353.102 (1996). This list of attributes is illustrative rather than exhaustive. *Cf. In re APA Transport Corp. Consolidated Litigation*, 541 F.3d 233, 241 (3d Cir. 2008) (recognizing as a canon of statutory construction that when the word "includes" is followed by a list of examples, that list is generally considered non-exhaustive). *See also Heidel v. U.S. Postal Service*, 69 M.S.P.R. 511, 516 (1996) (applying same principle to a list of factors analyzing "like status" when that list ends with the word "etc.").

¶18 The appellant suggests we should confine our analysis to the one job attribute with which he takes issue, namely, his duties. CRF, Tab 13 at 7. For this proposition, the appellant relies on the Board's statement in *Heidel* that "[i]f the duties and responsibilities of the new position are not comparable to those of the former position, the positions could not be of 'like status.'" *Id.*; *Heidel*, 69 M.S.P.R. at 516. However, the *Heidel* passage cannot be read apart from the regulatory definition or from the rest of the *Heidel* decision itself. *Heidel*, issued on February 13, 1996, does not acknowledge OPM's September 1, 1995 issuance of the regulatory definition of status at 5 C.F.R. § 353.102(a), which established a

non-exhaustive list of factors to consider. *See* 60 Fed. Reg. 45,652 (Sept. 1, 1995). As such, *Heidel* does not provide the most authoritative test for whether a position is of like status.[2] Nonetheless, *Heidel* does not, as the appellant suggests, establish a checklist of requirements related to like status, but instead endorses a totality of the circumstances test by "evaluating and weighing the pertinent factors." 69 M.S.P.R. at 516. The Board applied this test, weighing craft, grade, duties and responsibilities, but the Board found that the duties *and* responsibilities of the new position were "dissimilar enough" to the old position to warrant a finding that the positions were not of like status. *Id.* at 518.

Positions Compared

¶19 In comparing two positions, the Board looks beyond the title and grade of the positions involved, and compares the scope of actual duties and responsibilities of the new position with those of the former position. *See Gorny v. Department of the Interior*, 115 M.S.P.R. 520, ¶ 15 (2011). However, in the absence of any genuine dispute over the validity of the position descriptions, the Board has accepted them as valid. *Id.* The parties have provided the Board with copies of the appellant's pre-deployment IT Specialist position, GS-2210-11, Position No. FS96126, and his current IT Specialist position, GS-2210-11, Position No. GS285428. CRF, Tab 12, subtabs A and B. Here, although the appellant contends, albeit without any detail, that he is not actually performing the duties of the position description, he does not contend that the position description falsely describes the position intended for him. To the contrary, he states that he is "waiting" for training in Vicksburg that will enable him to perform all the duties of the position. CRF, Tab 13 at 39. Thus, we do not find the appellant's concern to raise any genuine dispute over the validity of comparing the two position descriptions. *See Gorny*, 115 M.S.P.R. 620.

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[2] Later Board decisions recognize the regulatory definition. *See, e.g., Rogers v. Department of the Army*, 88 M.S.P.R. 610, ¶ 7 (2001).

¶20 The appellant's original position is described as that of a hardware specialist in the Information Management Office, whose duties involved installing, repairing, evaluating, and configuring computer systems and their devices. CRF, Tab 12, subtab A. He also performed software-related duties in his original position, as evidenced by the appellant's statement that he: (1) installed, repaired, evaluated and configured computer systems, including software systems; (2) maintained an inventory and insured proper registration and receipts for hardware and software; and (3) called vendors for resolution of problems involving hardware and software. CRF, Tab 4 at 16-17 (Affidavit), Tab 12 at 7-8 (Agency).

¶21 The appellant's new position is described as that of a software asset manager who administers, develops, delivers and supports IT systems and services. CRF, Tab 12, subtab B at 2. The appellant's major duties include: (1) inventory management and logging; (2) ensuring license compliance; and (3) identifying, reporting and resolving a variety of IT issues and problems. *Id.* The agency submits that these three duties are similar to duties performed by the appellant in his previous position, but concedes that the old and new duties are different in other respects. CRF, Tab 12 at 8-9. Nonetheless, the agency submits, his current duties are of an "equivalent nature" to the duties of his previous position. *Id.* at 9.

Analysis

¶22 We find it undisputed, and therefore accept as fact, that the appellant's new position is similar or identical to his prior position in regard to pay, tenure, seniority, working conditions, and rank or responsibility. CRF, Tab 13 at 7. We find these factors weigh toward a finding that the appellant's current position is of like status to his prior position. 5 C.F.R. § 353.102; *Heidel*, 69 M.S.P.R. at 515-16, 518. We must weigh these factors against the sole factor under dispute, duties. *Id.* We will not interpret USERRA to require the appellant's new duties to be identical to the previous duties. As the Board has observed, albeit in non-

USERRA cases, "Since the appellant's former position has been abolished, [the appellant]'s placement in a different position necessarily involves the performance of different duties." *Gorny*, 115 M.S.P.R. 520, ¶ 18 (citing *Marion v. U.S. Postal Service*, 79 M.S.P.R. 443, 444 (1998) (finding new position had comparable status to previous one)).

¶23 The agency acknowledges that the new IT Specialist position involves a change in duties from the appellant's original IT Specialist position, but maintains that his new position is still of like status to his original position because, *inter alia*, his duties "are still in the information technology field and are of a similar magnitude" to those of his original position. CRF, Tab 12 at 8. The appellant, in turn, contends that the new IT Specialist position is not sufficiently similar to the original position. CRF, Tab 13 at 9-10. We find no dispute that the appellant's duties remain in the same general information management field in which he previously worked, and no dispute that the appellant's co-workers who were present for the A-76 outsourcing all essentially lost their positions: they either successfully competed for non-information management positions in the newly created ACE-IT, or the agency placed them in non-information management positions elsewhere within the District. The appellant has obtained the former opportunity, in ACE-IT, albeit still as an IT Specialist and without having to compete for his position. We cannot ignore the circumstances of the appellant obtaining a position in the information management field when his co-workers, equally situated to him except for his uniformed status, had no entitlement to such a position. These factors weigh in favor of a finding that the duties are sufficiently similar under the circumstances.

¶24 Notwithstanding our earlier discussion of *Heidel* and *Nichols*, the appellant suggests the facts of his case are analogous to those cases, where the employees' duties and responsibilities in their new positions were found to be too dissimilar to those of their old positions to be of like status. CRF, Tab 13 at 7. Those cases, however, are readily distinguishable. In *Heidel* and *Nichols*, the

individuals suffered a significant loss in responsibility as well as a diminution in duties; here, neither the responsibilities nor the duties have been diminished at all. *Heidel* involved a Mail Handler who previously performed a variety of tasks, had the opportunity to interact with his coworkers and supervisors in making decisions about how to reschedule work, trained new employees, and was exposed to the workplace decision-making process so as to better prepare him to be a supervisor if he chose to apply for such a position. 69 M.S.P.R. at 516-18. Upon Heidel's return from uniformed service, he was put in a position that required him to sit alone all day at the same table performing the same task. The Board found these two positions were not of like status. *Id.* at 518.

¶25 *Nichols* involved a Chief Chaplain who managed a staff of chaplains. 11 F.3d at 163. While Nichols was performing uniformed service, the agency replaced Nichols with a new Chief Chaplain. Upon Nichols' return from service, the agency placed Nichols under the new Chief Chaplain as one of his staff chaplains. *Id.* at 164. The Federal Circuit found the positions not of like status, reasoning: "It goes without saying that when one starts out as the boss, but is placed in a position subordinate to the replacement boss, and other new bosses, there is incontestably a loss of authority and accordingly a diminished status." *Id.* at 163-64. The Federal Circuit ordered the agency to restore Nichols to his original position, which was still available because, unlike here, the position had not been abolished. *Id.*

¶26 In this case, the appellant's new position is not at a lower level of responsibility or authority than his previous position; to the contrary, he concedes that the only difference between his old and new positions are the duties. Further, the appellant does not rebut the agency's contention that his new level of responsibility is "equivalent or even slightly greater in some areas, e.g., greater contacts with those outside the agency." CRF, Tab 12 at 10. Under the circumstances of this case, and weighing the factors of rank or responsibility, duties, working conditions, pay, tenure, and seniority, we find that the agency has

fulfilled its obligation to place the appellant in a position of like status to his prior position. We therefore find the agency is in compliance with its obligations under USERRA.

ORDER

¶27 We DISMISS this appeal as MOOT. This is the final decision of the Merit Systems Protection Board in this appeal. 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.