

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2012 MSPB 30

Docket No. DC-0351-11-0450-I-1

**Nadeen M. Smith,
Appellant,**

v.

**Department of the Air Force,
Agency.**

March 7, 2012

Nadeen M. Smith, Hampton, Virginia, pro se.

Kevin Greenfield, Andrews Air Force Base, Maryland, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman

OPINION AND ORDER

¶1 The appellant has petitioned for review of the May 31, 2011 initial decision that dismissed her appeal for lack of Board jurisdiction. For the reasons set forth below, we GRANT the appellant's petition and REMAND the case for further adjudication.¹

¹ The appellant has asked that the Board remove the agency representative from the case based on alleged misconduct. Because our regulations do not authorize the full Board to take such action, the appellant's request is DENIED. The administrative judge shall address this matter on remand. See [5 C.F.R. § 1201.31](#).

BACKGROUND

¶2 By memorandum dated March 24, 2010, the agency informed the appellant that, due to reorganization, she had been reached for a reduction in force (RIF) action. Initial Appeal File (IAF), Tab 5, Subtab 4c. The agency indicated that, pursuant to the RIF procedures prescribed by 5 C.F.R. part 351, she was being offered a “change-to-lower grade” from her current position of Pay Pool Advisor, YA-0301-02, to the position of Budget Analyst, GS-0560-09, with an effective date of June 6, 2010. *Id.* On March 25, 2010, the appellant signed a statement indicating that she accepted the position offer, and did so with the understanding that if she did not accept the offer she would be separated on June 6, 2010. *Id.*

¶3 Effective June 6, 2010, the agency reassigned the appellant to the position of Budget Analyst, GS-0560-09, Step 9. *Id.*, Subtab 4a. The Standard Form 50 recording the reassignment indicates that the action was taken under the legal authority of [5 C.F.R. § 351.603](#). *Id.* As a result of the reassignment, the appellant’s basic pay increased from \$52,433.00 to \$52,643.00, and her adjusted basic pay increased from \$50,858.00 to \$60,097.00. *Id.* The appellant filed an equal employment opportunity (EEO) complaint alleging that the agency’s action was the result of discrimination based on race, sex, age, and/or reprisal for protected EEO activity, and on February 20, 2011, the agency issued a final decision finding no discrimination. *Id.*, Subtab 3. This appeal followed. IAF, Tab 1. On the appeal form, the appellant checked a box indicating that she was appealing a “reduction in grade or pay.” *Id.*

¶4 The administrative judge dismissed the appeal for lack of jurisdiction, finding that the appellant’s reassignment to the GS-09 Budget Analyst position did not result in an appealable reduction in pay. IAF, Tab 7 (Initial Decision, May 31, 2011). On petition for review, the appellant concedes that she was not reduced in pay, but contends that she was subjected to a RIF action as a result of illegal discrimination. Petition for Review File (PFR File), Tab 1.

ANALYSIS

¶5 While the appellant indicated on her initial appeal form that she was appealing a “reduction in grade or pay,” it is apparent from her submissions below and on review that she is seeking to appeal the agency’s June 6, 2010 RIF action. RIF actions are not appealable under 5 U.S.C. chapter 75. See [5 U.S.C. § 7512\(B\)](#). However, an employee who has been “demoted” by a RIF action may appeal to the Board under [5 C.F.R. § 351.901](#).² The term demotion is defined as follows:

Demotion means a change of an employee, while serving continuously within the same agency:

(i) To a lower grade when both the old and the new positions are under the General Schedule or under the same type graded wage schedule; or

(ii) To a position with a lower rate of pay when both the old and the new positions are under the same type ungraded wage schedule, or are in different pay method categories.

[5 C.F.R. § 210.202\(b\)\(4\)](#).

¶6 Where, as here, an employee is moved from a position in one pay method category to a position in a different pay method category, it is the rate of pay of the position, not the pay received by the employee, that determines whether there has been a demotion. See *Robinson v. U.S. Postal Service*, [63 M.S.P.R. 307](#), 318-19 (1994); *Brown v. U.S. Postal Service*, [58 M.S.P.R. 345](#), 349 (1993). Hence, the fact that the appellant was not herself reduced in pay is not dispositive of the jurisdictional issue. See *Brown*, 58 M.S.P.R. at 348-50. Rather, we have held that assignment to a position in a different pay system constitutes a demotion under § 210.202(b)(4)(ii) if the representative rate of the position to which the appellant is assigned is lower than that of the employee’s former position.

² An employee’s acceptance of a RIF assignment offer in lieu of separation does not divest the Board of jurisdiction over the resulting action if that action is otherwise appealable under the RIF regulations. *Robinson v. U.S. Postal Service*, [63 M.S.P.R. 307](#), 327 (1994); *Brown v. U.S. Postal Service*, [58 M.S.P.R. 345](#), 351-52 (1993).

Campbell v. Department of the Treasury, [61 M.S.P.R. 99](#), 102 (1994). Thus, in order to determine whether the appellant suffered an appealable RIF demotion, we must compare the representative rates of the GS-09 Budget Analyst and YA-02 Pay Pool Advisor positions.

¶7 For General Schedule positions, the representative rate is defined as the fourth step of the pertinent grade, using the applicable locality rate. [5 C.F.R. § 351.204](#). Based on that definition, the representative rate of the GS-09 Budget Analyst position to which the appellant was assigned was \$52,192.00. For positions in a pay band, such as the appellant's former YA-02 Pay Pool Advisor position, the representative rate is defined as "the rate (or rates) the agency designates as representative of that pay band or competitive levels within the pay band," including any applicable locality payment. *Id.* Because we were unable to determine from the record below what rate the agency had designated as representative of the YA-02 pay band or the appellant's competitive level within that pay band, we issued an order directing the agency to provide the necessary information. PFR File, Tab 6. In response to that order, the agency has provided evidence showing that the representative rate of pay for the appellant's former YA-02 Pay Pool Advisor position, including the applicable locality pay, was \$63,939.00 at the time of the June 6, 2010 RIF action. PFR File, Tab 7.

¶8 Because the June 6, 2010 RIF action resulted in the appellant's placement in a position with a lower rate of pay, we conclude that her appeal lies within the Board's jurisdiction under [5 C.F.R. § 351.901](#).

ORDER

¶9 Accordingly, we REMAND the appeal to the Washington Regional Office for adjudication on the merits, including a decision on the appellant's discrimination claims. *See* [5 U.S.C. § 7702\(a\)\(1\)](#).

FOR THE BOARD:

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