UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 41

Docket Nos. DE-0351-11-0177-I-2
DE-0351-11-0199-I-2
DE-0351-11-0196-I-2
DE-0351-11-0235-I-2
DE-0351-11-0197-I-2
DE-0351-11-0198-I-2

Modesta R. Blackhat,

Ronald D. Chimerica,

Leroy Grayhat,

Kimberly A. Hardy,

Steven Huskie, and

Loren J. Montoya,

Appellants,

v.

Department of Health and Human Services,

Agency.

March 23, 2012

Richard D. Cantin, Scottsdale, Arizona, for the appellants.

Kenneth M. Propst, San Francisco, California, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellants have petitioned for review of the initial decisions issued in their respective appeals, which dismissed their reduction in force (RIF) appeals for lack of jurisdiction because a negotiated grievance procedure was the exclusive remedy available to the appellants. We consolidate these appeals at the request of the appellants because these appeals contain identical or similar issues and their joint consideration expedites processing without adversely affecting the interests of the parties. *See* 5 U.S.C. § 7701(f)(1); 5 C.F.R. § 1201.36. For the reasons given below, we DENY the appellants' petitions for review and AFFIRM the initial decisions as modified below.

BACKGROUND

¶2 The appellants were employed by the Indian Health Service (IHS). *See* Blackhat Initial Appeal File (BIAF), Tab 6, Subtab 4a.[1] Their positions with the government were abolished in 2002 when the Tuba City Regional Health Care Corporation (TCRHCC) took over operation of the Tuba City Indian Hospital and all of its programs. *Id.*, Subtab 1 at 3, Subtab 4q at 1, Subtab 4s at 2-3. The appellants were provided employment with TCRHCC while remaining federal employees under the Intergovernmental Personnel Act (IPA). *Id.*, Subtabs 4p, 4s. When entering into the IPA agreements, all of the appellants were informed that if their IPA assignments were terminated and they were not offered direct employment with TCRHCC, they would be subject to a RIF and possible termination if IHS positions were not available. *Id.*, Subtab 4s at 2-3. The appellants' assignments with TCRHCC were terminated in the fall of 2010, and the appellants were removed from federal service by a RIF effective in January 2011. *Id.*, Subtabs 4a, 4b, 4c.

---

[1] The case files for all of the consolidated appeals are primarily the same. For simplicity, the Blackhat case file has been referenced when referring to common or similar documents.

¶3 The appellants filed appeals with the Board. In response, the agency asserted that: (1) the Board could not review TCRHCC's decision to terminate the IPA assignments because TCRHCC was not a government agency; and (2) the Board could not adjudicate issues related to the agency's RIF actions because a negotiated grievance procedure was the exclusive remedy available under the collective bargaining agreement (CBA). BIAF, Tab 6, Subtab 1. After providing an opportunity for the appellants to respond to the agency, the administrative judge dismissed the appeals for lack of jurisdiction for the reasons proffered by the agency. BIAF, Tab 5, Tab 7, Initial Decision (ID).[2]

¶4 The appellants filed timely petitions for review in which their representative requested consolidation. Blackhat Petition for Review (BPFR) File, Tab 1. The agency filed timely responses in opposition. BPFR File, Tabs 3, 4.

ANALYSIS

The Board lacks jurisdiction over personnel decisions by a non-federal entity.

¶5 "[T]he Board's jurisdiction is not plenary; rather, it is limited to actions designated as appealable to the Board 'under any law, rule, or regulation.'" *Morse v. Merit Systems Protection Board*, 621 F.3d 1346, 1351 (Fed. Cir. 2010) (citations omitted); 5 U.S.C. § 7701(a). The record indicates that TCRHCC is not a part of the federal government. BIAF, Tab 6, Subtab 4n. Rather, it appears that TCRHCC's purpose was to remove "federal domination" from the provision of health services to Tuba City. *See id*. at 1. Because TCRHCC is not part of the

---

[2] The administrative judge found that Appellants Greyhat and Montoya had alleged veterans' discrimination but that both appellants failed to make nonfrivolous allegations of Board jurisdiction over such claims. Greyhat Initial Appeal File, Tab 10, Initial Decision at 4, 7-8; Montoya Initial Appeal File, Tab 10, Initial Decision at 4, 7-8. The Board will normally only consider issues raised in a timely filed petition for review or in a timely filed cross petition for review. 5 C.F.R. § 1201.114(b). Because the appellants do not challenge these findings on petition for review, we will not further consider this issue. Greyhat Petition for Review File, Tab 1; Montoya Petition for Review File, Tab 1.

federal government subject by statute to competitive or excepted service requirements, the Board lacks jurisdiction over the merits of the termination of the appellants' IPA assignments by TCRHCC. BIAF, Tab 6, Subtab 4c; Chimerica Initial Appeal File (IAF), Tab 6, Subtab 4d; Greyhat IAF, Tab 6, Subtab 4d; Hardy IAF, Tab 6, Subtab 4d; Huskie IAF, Tab 6, Subtab 4d; Montoya IAF, Tab 6, Subtab 4d.

The negotiated grievance procedure is the exclusive available remedy regarding the RIF actions.

¶6 If an employee is covered by a CBA that does not exclude RIF actions, the negotiated grievance procedures set forth in the CBA are generally the exclusive procedures for resolving RIF actions that would otherwise be appealable to the Board.[3] *See* 5 U.S.C. § 7121(a); *Bonner v. Merit Systems Protection Board*, 781 F.2d 202, 204-05 (Fed. Cir. 1986); *see also* 5 C.F.R. § 1201.3(c)(1).

¶7 The agency submitted documents that indicate that the appellants were represented by the Laborers' International Union of North America Local 1376 at the time of their separations. BIAF, Tab 6, Subtab 4u, Subtab 4a (Box 37), Subtab 4d at 5. The CBA between the agency and Local 1376 contains a section that lists the subjects excluded from coverage by the grievance procedure. *Id.*, Subtab 4d at 1, 7. This section makes no explicit or implicit mention of RIFs. *Id.* at 7. The section of the agreement directly pertaining to RIFs states that the union and agency will bargain "to the full extent of the law" regarding RIFs, but makes no mention of the inclusion or exclusion of RIF decisions from the negotiated grievance procedures. *Id.* at 15-16.

---

[3] An aggrieved employee who alleges that he has been affected by discrimination prohibited under 5 U.S.C. § 2302(b)(1) may elect to file an appeal with the Board concerning an action otherwise exclusively covered by the negotiated grievance procedures of the CBA. *See* 5 U.S.C. § 7121(d); *McCann v. Department of the Navy*, 57 M.S.P.R. 288, 294 (1993); 5 C.F.R. § 1201.3(c)(1)(i). However, these appellants have not alleged discrimination under section 2302(b)(1).

¶8 The appellants assert that they have not been covered by a CBA "for several years"[4] and have no union representation.[5] BPFR File, Tab 1 at 2. According to the appellants, TCRHCC "refused to recognize the union." *Id*. at 2, 6. However, as explained above, the Board lacks jurisdiction over the actions of TCRHCC. Thus, the question is not whether TCRHCC recognized the union, it is whether a CBA between the union and IHS provided for a negotiated grievance procedure with respect to RIFs conducted by IHS. The appellants have not disputed the authenticity of the agency's documents showing that the appellants were in a bargaining unit covered by the CBA and that the CBA did not list RIFs among the matters excluded from the negotiated grievance procedures. The administrative judge therefore did not err when she held that the Board lacks jurisdiction over these RIF actions because the CBA was the exclusive remedy available to the appellants. *See Moreno v. Merit Systems Protection Board*, 728 F.2d 499, 500-01 (Fed. Cir. 1984) (holding that negotiated grievance procedures were the "sole review mechanism" for the denial of the appellant's within-grade increase: the appellant did not challenge the authenticity of the negotiated agreement or his membership in a bargaining unit covered by the negotiated agreement, and the agreement did not list within-grade increase denials among the matters excluded from the grievance procedures).

---

[4] The record does not indicate an expiration date of the CBA. BIAF, Tab 6, Subtab 4d. However, we note that the enforceability of negotiated grievance and arbitration procedures continues upon the expiration of a CBA, absent an express agreement by the parties to the contrary. *Hill v. Department of the Army*, 67 M.S.P.R. 535, 538 (1995). Neither party has provided evidence of such an agreement.

[5] The CBA at issue states that a grievance may be filed "with or without [u]nion representation" and "an employee may represent him/herself" in a grievance. BIAF, Tab 6, Subtab 4d at 7-8.

ORDER

¶9 This is the final decision of the Merit Systems Protection Board in these appeals. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANTS 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:

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