

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

TERRENCE J. JOHNS,
Appellant,

DOCKET NUMBER
DA-0351-11-0024-X-1

v.

DEPARTMENT OF AGRICULTURE,
Agency.

DATE: October 4, 2012

THIS ORDER IS NONPRECEDENTIAL¹

Andrew Brumsey, Harvey, Louisiana, for the appellant.

Thomas E. Dunn and Cheri G. Alsobrook, New Orleans, Louisiana, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

ORDER

On May 24, 2012, the administrative judge issued a Recommendation that the Board find the agency noncompliant with the November 1, 2011 Initial Decision, which became the Board's final decision on December 6, 2011, after

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See [5 C.F.R. § 1201.117\(c\)](#).

neither party petitioned for review. MSPB Docket No. DA-0351-11-0024-C-1, Compliance File (CF), Tab 7 at 1, 7; MSPB Docket No. DA-0351-11-0024-I-1, Initial Appeal File (IAF), Tab 43. The Initial Decision reversed the appellant's demotion and ordered the agency to reassess the appellant's qualifications for certain positions. IAF, Tab 43 at 2, 18-19, 30. In his petition for enforcement, the appellant contended that the agency failed properly to reassess him and find him qualified for the positions. CF, Tab 1 at 2-3. For the reasons discussed below, we find the agency not in compliance with the Initial Decision and order appropriate relief.

DISCUSSION OF ARGUMENTS AND EVIDENCE OF COMPLIANCE

Following a reduction in force (RIF), the agency demoted the appellant from the position of Contact Representative, GS-0962-07, to Civilian Pay Technician, GS-0544-05. IAF, Tab 43 at 2. The Initial Decision reversed the demotion, finding that the agency failed to prove by preponderant evidence that it "properly applied the RIF regulation to the appellant" – specifically, with regard to whether he was qualified for and entitled to reassignment to positions higher than GS-05. *Id.* at 3, 5, 18-19.² The Initial Decision ordered the agency to reassess the appellant's qualifications for the Program Analyst, Financial Management Assistant, and Accounting Technician positions, using the information in the appellant's Official Personnel Folder (OPF), his resume, and any documents submitted in response to the agency "data call" (its request, prior to the RIF, that employees update their skills and other relevant information for evaluation during the RIF proceedings). *Id.* at 30.

The appellant filed a petition for enforcement on January 27, 2012, asserting that the agency had failed accurately to reassess his qualifications. CF,

² The appellant contended that he was qualified for and entitled to reassignment to the following positions: Program Analyst, GS-0343-07; Financial Management Assistant, GS-0503-06; and Accounting Technician, GS-0525-06. IAF, Tab 43 at 12.

Tab 1 at 2-3. After the parties submitted evidence, the administrative judge issued a Recommendation finding that the agency had provided only conclusory statements regarding its assessment of the appellant's qualifications, unsupported by documentation. CF, Tab 7 at 5-6. The administrative judge noted that the agency failed to evaluate the duties set forth in the position description for the GS-07 Contact Representative position (which the appellant occupied at the time of the RIF), to determine whether these duties qualified him for the three positions at issue. *Id.* at 5-6. The administrative judge again instructed the agency to reassess the appellant's qualifications, to provide a "sworn affidavit stating with specificity the exact steps that were taken . . . and precisely why the appellant was deemed unqualified for each position," and to submit all the documentation on which the agency based its determinations. *Id.* at 6. The administrative judge specified that the documentation should include the position descriptions for the GS-07 Contact Representative position and the positions at issue, as they existed in 2005. *Id.*

On June 7, 2012, the agency submitted a declaration from Charles Polleck, Human Resources Specialist, which found the appellant not qualified for any of the positions at issue. MSPB Docket No. DA-0351-11-0024-X-1, Compliance Referral File (CRF), Tabs 3-6; *see also id.*, Tab 7. Mr. Polleck stated that for each of 52 individual positions (all variants of the three position types for which the appellant asserted he qualified), he compared the "work experience described in Mr. Johns' resumes against the major duties, and the knowledge required to successfully accomplish those duties." CRF, Tab 3 at 5. He also stated that he compared the appellant's transcripts against the "level of academic achievement necessary to be found qualified for the position based upon education," and found them insufficient. *Id.* Mr. Polleck did not state whether he compared the duties set forth in the GS-07 Contact Representative position with the duties of the

positions at issue, as the administrative judge had instructed.³ See CRF, Tab 7 at 5-6. In addition, although the agency submitted position descriptions for the GS-07 Contact Representative position and the positions of issue, none identify dates, and the agency did not expressly state whether these descriptions were for the positions as they existed in 2005, as the administrative judge had ordered. *Id.* at 6.

ANALYSIS

When the Board finds a personnel action unwarranted or not sustainable, it orders that the appellant be placed, as nearly as possible, in the situation he would have been in had the wrongful personnel action not occurred. *House v. Department of the Army*, [98 M.S.P.R. 530](#), ¶ 9 (2005). The agency bears the burden to prove its compliance with a Board order. An agency's assertions of compliance must include a clear explanation of its compliance actions supported by documentary evidence. *Vaughan v. Department of Agriculture*, [116 M.S.P.R. 319](#), ¶ 5 (2011).

As discussed above, it is unclear from the agency's submissions whether the position descriptions it submitted were for the Contact Representative, Program Analyst, Financial Management Assistant, and Accounting Technician positions as they existed in 2005, at the time of the RIF. Moreover, the agency apparently did not compare the duties of the appellant's GS-07 Contact Representative position against the duties of the Program Analyst, Financial Management Assistant, or Accounting Technician positions, as required to comply with the Initial Decision. See CF, Tab 7 at 5-6; CRF, Tabs 3-6. If the

³ The Recommendation did not specifically include this instruction in its "Recommendation" section. CRF, Tab 7, at 6. Nevertheless, it is plain from this section and from the discussion that precedes it that a proper reassessment would compare the duties of the position the appellant occupied at the time of the RIF to the duties of the positions for which he claims he is qualified. See *id.* at 5-6. Therefore, the agency should have conducted this comparison.

agency conducted such a comparison, it did not explain the results. Accordingly, we find the agency in noncompliance with the Initial Decision.

Within **10 days** of the date of this Order, the agency shall:

1. Submit a statement explaining whether the position descriptions it provided on June 7, 2012, for the GS-07 Contact Representative position and the Program Analyst, Financial Management Assistant, and Accounting Technician positions, represent the duties of these positions as they existed in 2005.⁴ If so, the agency shall identify the 2005 positions by page number. If the position descriptions are not for the 2005 positions, the agency shall submit the 2005 position descriptions;
2. Compare the duties of the appellant's GS-07 Contact Representative position, as it existed in 2005, to the duties of the Program Analyst, Financial Management Assistant, and Accounting Technician positions for which the appellant contends he is qualified, as they existed in 2005. The agency shall submit a chart explaining its comparisons and its conclusions regarding the appellant's qualifications, and shall provide a sworn affidavit from the employee who conducted the comparisons;
3. State whether the appellant's performance appraisal for the period of October 1, 2004, through September 30, 2005, is complete. *See* CRF, Tab 5 at 46 (page 46 of 114). Unlike the other performance appraisals submitted by the agency, this appraisal lacks an explanation of the position's performance elements and standards. If the appraisal is not complete, the agency shall submit a complete copy. If the agency cannot locate a complete copy, it shall state whether the performance elements and standards for October 1, 2004, through September 30, 2005, differed from

⁴ For example, there appear to be two position descriptions for the GS-07 Contact Representative position. *See* CRF, Tab 4, Tab 6 at 18. It is unclear if either is from 2005.

those set forth in the appellant's performance appraisal for the period of October 1, 2003, through September 30, 2004. *See* CRF, Tab 5 at 47-51;

4. State whether the agency's records contain any resumes or transcripts from the appellant submitted at any time following his entry on duty and prior to the date specified in the "data call" performed in connection with the RIF. If so, the agency shall evaluate the resumes or transcripts as part of its assessment of the appellant's qualifications, and submit a copy to the Board; and
5. If the agency finds the appellant qualified for one of the identified positions, the agency must cancel the appellant's demotion and place him in one of those positions or a position of like grade, pay, tenure, and commuting area. The agency must then issue a check to the appellant for the appropriate amount of back pay, with interest, and adjust benefits with appropriate credits and deductions in accordance with the Office of Personnel Management's regulations. *See* CF, Tab 7 at 6-7; IAF, Tab 43 at 30-31.

The appellant shall submit any response within **10 days** of the agency's submission. Failure to do so may cause the Board to assume the appellant is satisfied and dismiss the petition for enforcement.

FOR THE BOARD:

William D. Spencer
Clerk of the Board

Washington, D.C.