

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

64 M.S.P.R. 464

Docket Numbers PH-0351-94-0071-I-1, PH-0351-94-0082-I-1, PH-0351-94-0074-I-1

**STEVE J. BATEMAN, III, WALTER E. DISNEY, AND WILLIAM F.  
SCHUMM, Appellants,**

**v.**

**DEPARTMENT OF THE NAVY, Agency.**

Date: September 23, 1994

James E. Blick, Jr., International Federation of Professional and Technical  
Engineers, Portsmouth, Virginia, for the appellants.

Douglas T. Frydenlund, Portsmouth, Virginia, for the agency.

**BEFORE**

Ben L. Erdreich, Chairman  
Jessica L. Parks, Vice Chairman  
Antonio C. Amador, Member

**OPINION AND ORDER**

The appellants have timely petitioned for review of the March 4, 1994 initial decisions that affirmed the agency's reduction in force (RIF) actions. We CONSOLIDATE these appeals under 5 U.S.C. § 7701(f) on petition for review because they concern the same agency, the same representatives and identical issues, and consolidation will not adversely affect any party. For the reasons set forth below, we GRANT the petitions for review under 5 C.F.R. § 1201.115, VACATE the initial decisions, and REMAND these appeals to the regional office for further adjudication.

**BACKGROUND**

Appellant Bateman was demoted from his WN-07 Supervisory Planner and Estimator (P&E) (General) position to a WD-08 P&E (Pipefitter) position effective October 15, 1993, under RIF regulations. See Bateman Initial Appeal File (IAF), Tab 5, Subtabs 4a, 4c, 4f. Appellant Disney was similarly demoted from his WN-07 Supervisory P&E (General) position to a WD-08 P&E (Marine Machinery Mechanic) position effective October 15, 1993. See Disney IAF, Tab 5, Subtabs 4a, 4d, 4e. Appellant Schumm was demoted from his WD-08 P&E (Marine Machinery Mechanic) position to a WD-06 P&E (Marine Machinery Mechanic) position effective October 15, 1993, when appellant Disney retreated into his WD-08 position. See Schumm IAF, Tab

5, Subtabs 4a, 4e, 4f, 4g. When the appellants timely filed their appeals, the administrative judge consolidated them for hearing purposes, but issued three separate initial decisions affirming the demotion actions. See Bateman IAF, Tabs 1, 17; Disney IAF, Tabs 1, 15; Schumm IAF, Tabs 1, 13.

In separately filed petitions for review, the appellants assert that the administrative judge erred in finding that the competitive levels for the Supervisory P&E positions were correct. They argue that the administrative judge misunderstood their argument regarding the competitive levels and consequently disregarded testimony and evidence, that the administrative judge failed to make necessary credibility determinations, and that the administrative judge denied the appellants' request to submit rebuttal evidence. See Bateman Petition For Review (PFR) File, Tab 1; Disney PFR File, Tab 1, Schumm PFR File, Tab 1. The agency has timely responded in opposition to each of the petitions for review.

### ANALYSIS

Under 5 C.F.R. § 351.403(a), an agency must establish competitive levels consisting of all positions in a competitive area which are of the same grade (or occupational level) and classification series and which are similar enough in duties, qualification requirements, pay schedules, and working conditions so that the incumbent of one position could successfully perform the critical elements of any other position upon entry into it, without any loss of productivity beyond that normally expected in the orientation of any new but fully qualified employee.

The proper application of this RIF regulation is a substantive right, not a procedural one. See, e.g., *Schroeder v. Department of Transportation*, 60 M.S.P.R. 566, 577 (1994). The Board will not reverse a RIF in those cases where it is shown that the agency's error in not precisely complying with the RIF regulations had no adverse effect on the employee's substantive entitlements. *Id.* However, the burden is on the agency to prove by a preponderance of the evidence that its error had no adverse effect on the employee's substantive entitlements. *Id.*

In October and November 1992, the agency reorganized the P&E Department at the Norfolk Naval Shipyard where the appellants were employed so that the P&E subcomponents were aligned with the Engineering Department as directed by NAVSEA. See Schumm IAF, Tab 15, Exhibit Q. As a part of that realignment, a number of supervisors and employees were reassigned to different subcomponents with new or different code section numbers. See *Id.*, Exhibits T, U, W. Before the reassignment, all supervisors had occupied positions designated "General" and had supervised employees in a variety of crafts. See Testimony of Planning Assistant Isiaah Baker, Hearing Tapes (HT) 1B, 2A. After the reassignments, most of the positions the supervisors occupied received a new designation of Supervisory P&E within a specific craft such as Boilermaker, Sheet Metal Mechanic, or Electrical. The positions of appellants Disney and Bateman retained the "General" designation. See Bateman IAF, Tab 5, Subtab 4a; Disney IAF, Tab 5, Subtab 4a. Competitive levels for Supervisory P&Es were drawn up based on the position descriptions after the reassignments. All Supervisory P&E (General) positions were placed in the same

competitive level. A separate competitive level was created for each trade-specific Supervisory P&E position. See Bateman IAF, Tab 8.

The agency submitted into the record below a position description for both Disney and Bateman. See Disney IAF, Tab 5, Subtab 4n; Bateman IAF, Tab 5, Subtab 4p. The appellants submitted position descriptions for other Supervisory P&E positions. See Schumm IAF, Tab 15, Exhibit V. A comparison of the position descriptions shows that differences in the required knowledge and skills and qualifications exist. For instance, Disney's position description states that the Supervisory P&E (General), Surface Ship Nuclear Code Section 231.8, supervises an Electrician, Marine Machinery Mechanic, Pipefitter, Shipfitter, Sheetmetal Mechanic, and Electronics Mechanic, and lists as a qualification "trade/craft knowledge of one of the five trades." Disney IAF, Tab 5, Subtab 4n. Bateman's position description for the Supervisory P&E (General), Surface Ship Boiler, Air Conditioning and Piping Code Section 231.5, describes the position as supervising Pipefitters, Insulators, Air Conditioning Mechanics, and Boilermakers, and requires trade/craft knowledge in one of those crafts. See Bateman IAF, Tab 5, Subtab 4p. In contrast, the position description for the Supervisory P&E (Boilermaker), Boilermaker Code Section 243a, specifies supervision of Boilermakers only and requires trade/craft knowledge and experience in the Boilermaker trade. See Schumm IAF, Tab 15, Exhibit V5. The position description of Disney's position does not require special knowledge of the Boilermaker trade and the incumbent of that position would not necessarily be able to assume the responsibilities of the Supervisory P&E (Boilermaker) position. Bateman, on the other hand, supervised Boilermakers and could possibly fulfill the requirements of the Supervisory P&E (Boilermaker) position, but his area of expertise may be one of the other trades he supervised. In order for positions to occupy the same competitive level, it does not matter that the individuals in the positions could qualify for a particular position but that anyone who qualified for one position could qualify for all. See *Estrin v. Social Security Administration*, 24 M.S.P.R. 303, 307 (1984). Thus, all of the Supervisory P&E positions as they are described in the official position descriptions could not be in the same competitive level. See *Kline v. Tennessee Valley Authority*, 46 M.S.P.R. 193, 195-200 (1990), *aff'd in part*, 805 F. Supp. 545 (E.D. Tenn. 1992).

We find, however, that the inquiry in these appeals requires consideration of more than the official position descriptions. While, in most instances, the official position description will serve as the primary evidence of the propriety of a competitive level, it is not the only evidence that the Board will consider. See *Simonton v. Department of the Army*, MSPB Docket No. AT-0351-94-0051-I-1, slip op. at 7-9 (Apr. 12, 1994); *Schroeder*, 60 M.S.P.R. at 574-78.

The appellants argue, as they did below, that the position descriptions do not reflect what actually happened under the reorganization and that the trade/craft qualifications are not an actual part of the Supervisory P&E positions because the supervisors are continuing to supervise the same employees that they supervised before the reorganization. See PFR Files, Tab 1; Bateman IAF, Tabs 1, 8; Disney IAF, Tabs 1, 8; Schumm IAF, Tab 1. In support of this argument, the appellants offered the testimony of co-workers Arnold Beard and Kenneth Brimer. Beard, a Boilermaker, testified that, although he was reassigned from Code Section 268M to Code Section

243a in November 1992, he continued to work in Code Section 268M. He testified that his supervisor was Code Section 268M Supervisory P&E Harry Lee throughout that time and that Sam Bass, who according to the SF-50 documenting his reassignment occupied the Supervisory P&E position in Code Section 243a from November 1992, never supervised him. See HT 3B; Bateman IAF, Tab 8, Exhibit C2. Brimer, a Sheetmetal Mechanic, testified that he continued to work in Code Section 243a, newly designated as a Boilermaker code, even though he was reassigned to Code Section 256 in November 1992. Brimer further testified that Sam Bass, who according to his position description supervised only Boilermakers, supervised him from November 1992 until about a month before the hearing. See HT 3B.

The agency offered the testimony of Planning Assistant Isiaah Baker to show that it reorganized the P&E Department in October and November 1992 by reassigning supervisors and employees to realign the Planner and Estimator division with Engineering. He testified that Code Section 243a had been a combination of trades but that after the reorganization it was changed to a Boilermaker code. Baker also testified that he recommended abolishing Code Section 257 (Sheet Metal Mechanic) in November 1992, but that employees were reassigned to Code Section 257 in October and November 1992. When asked why employees were reassigned to a code scheduled to be abolished, Baker stated that the abolishment was only a recommendation at that time. He further testified that Code Section 257 was abolished, but he did not specify and the record does not show when the positions in that section were abolished. See HT 1A, 1B, 2A. The administrative judge cited Baker's testimony only as evidence of the bona fides of the reorganization. See Initial Decisions at 3. The appellants did not specifically challenge the bona fides of the reorganization except to assert that differences reflected in the position descriptions of the Supervisory P&Es only existed on paper.

In determining that the competitive levels were correct, the administrative judge stated that the agency's RIF Coordinator, Edith Rider, testified that neither the types of employees supervised nor the supervisor's specific trade solely determined the supervisor's competitive level. See Disney Initial Decision at 5; Bateman Initial Decision at 6; Schumm Initial Decision at 6. However, the position descriptions for the Supervisory P&E positions are identical except for the types of employees supervised and the specific trade of the supervisor. See Schumm IAF, Tab 15, Exhibit V; Disney IAF, Tab 5, Subtab 4n; Bateman IAF, Tab 5, Subtab 4p. The administrative judge did not examine the position descriptions for the other Supervisory P&E positions and in fact refused to admit them into evidence. See HT 4A. The administrative judge further failed to make any credibility determinations regarding the testimony of Baker, Beard, and Brimer, or reconcile their testimonies in any way. See *Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980). For this reason, we find it necessary to remand this appeal to the regional office for a determination of whether the Supervisory P&E (General) competitive level of appellants Bateman and Disney was properly drawn or whether it should have included the other Supervisory P&E positions.

The appellants on petition for review argue also that the administrative judge erred in refusing at the conclusion of the hearing to hold the record open for the submission

of depositions from other employees to rebut the testimony of Baker and to corroborate the testimony of Brimer and Beard that they never worked in their newly-assigned code sections. See Bateman PFR File, Tab 1; Disney PFR File, Tab 1; Schumm PFR File, Tab 1; HT 4A. We find that the administrative judge did not abuse her discretion in refusing to hold the record open because the appellants have not shown that the proffered evidence was unavailable before the close of the hearing or that it was not repetitious of the hearing testimony. See *Roth v. U.S. Postal Service*, 54 M.S.P.R. 290, 295-96 (1992); *Strickler v. Office of Personnel Management*, 51 M.S.P.R. 354, 356-57 (1991).

We note that appellant Schumm did not challenge his own competitive level. Rather, he argued both below and on petition for review that the RIF action demoting him was incorrect because, had the competitive level for appellant Disney included Supervisory P&E Sam Bass, Bass and not Disney would have been demoted through RIF. According to Schumm, Bass had no retreat rights to Schumm's position and, therefore, Schumm would not have been demoted to make room for Bass. See Schumm IAF, Tabs 1, 8; Schumm PFR File, Tab 1. On remand, the administrative judge shall determine whether Schumm's demotion was caused by the incorrect placement of the positions of Disney and Bass in different competitive levels.

### ORDER

Accordingly, we REMAND these appeals to the regional office for further adjudication of whether the competitive level for appellants Bateman and Disney should have included the other Supervisory P&E positions. If the administrative judge finds that the competitive level was incorrectly drawn, she shall also determine whether the agency's error affected the appellants', including Schumm's, substantive rights. See *Schroeder*, 60 M.S.P.R. at 577-79. If necessary to determine whether the agency correctly established the competitive level and whether any such error affected the appellants' substantive rights under the RIF regulations, the administrative judge shall afford the parties an opportunity to submit additional evidence and argument on these issues. See *Id*

For the Board  
Robert E. Taylor, Clerk  
Washington, D.C.