

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

Docket Number ATM03518110533

**Robert L. Blalock, et al, Appellant,**

**v.**

**Department of Agriculture, Agency.**

Date: January 31, 1985

**BEFORE**

Herbert E. Ellingwood, Chairman  
Maria L. Johnson, Acting Vice Chair  
Dennis M. Devaney, Member

**OPINION AND ORDER**

This case comes before the Board on three separate petitions for review,<sup>1</sup> filed by the agency and six of the appellants, from the January 12, 1983 initial decision of Administrative Law Judge (ALJ) John McCarthy which reversed the separation of twenty four appellants and dismissed the appeals of the remaining eight for lack of jurisdiction.

**BACKGROUND**

Twenty appellants formerly occupied positions as State Directors (SD) of the Farmers Home Administration (FmHA) and twelve were State Executive Directors (SED) of the Agricultural Stabilization and Conservation Service (ASCS). Each held an excepted appointment under Schedule A<sup>2</sup> and was informed that as a result of Executive Order No. 12,300<sup>3</sup> his position had been abolished. The Executive Order provided, *inter alia*, that SD and SED positions "shall be listed in Schedule C<sup>4</sup> for all

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<sup>1</sup> Appellants covered by this Opinion and Order are listed in the attached Appendix.

<sup>2</sup> "Positions other than those of a confidential or policy determining character for which it is not practicable to examine shall be listed in Schedule A." 5 C.F.R. § 6.2. See 5 C.F.R. § 213.3113(d)(3) and (e)(4) (1981), setting forth the specific Schedule A exceptions in question.

<sup>3</sup> 3 C.F.R. 143 (1982), *reprinted in* 5 U.S.C.A. § 3301 note (1982).

<sup>4</sup> "Positions of a confidential or policy-determining character shall be listed in Schedule C." 5 C.F.R. § 6.2. See 5 C.F.R. § 6.8(c) (1982), specifying that SD and SED positions are excepted from the competitive service and are listed in Schedule C.

grades of the General Schedule.” Because each appellant was the single occupant of his competitive level and competitive area, each was separated by reduction in force (RIF).

On appeal to the Board the cases were consolidated and assigned to the ALJ for hearing and adjudication.<sup>5</sup> In his decision, the ALJ found that no reclassification warranting a RIF had occurred as a result of the Schedule C designation; no change in duties had taken place either, so that there had been no reorganization; and, in this light, the actions taken were removals for cause rather than RIFs. He then examined the actions as adverse actions and held that none of the procedural protections of 5 U.S.C. §§ 7511-7513 were accorded appellants; that appellants were removed from their Schedule A appointments, not ones in Schedule C; that those appellants who are preference eligibles<sup>6</sup> have a right to appeal to the Board from a removal for cause and that the absence of any of the procedures required by law constitutes harmful error necessitating reversal of the action as to them under 5 U.S.C. § 7701(c)(2)(A); but that non-preference eligibles in the excepted service have no right of appeal to the Board and their appeals must be dismissed.

In its petition for review, the agency contends that the change from Schedule A to Schedule C meets the definition of a reorganization and that RIF action was, therefore, proper; that even if the actions are viewed as adverse actions they are not reviewable since the Executive Order itself effected the change to Schedule C and removal from a Schedule C job is not appealable; and, considering these arguments, that there has been no harmful error and so no basis for reversal.

The non-veteran FmHA appellants assert that it was improper to dismiss as to them because they were separated by RIF and 5 C.F.R. § 351.901 provides the Board with jurisdiction over RIF appeals. Appellant Burke, in his own petition for review, argues in support of the position taken in the FmHA appellants' petition. Neither of the ASCS non-preference eligibles filed a petition for review.

## ANALYSIS

An agency is required by 5 C.F.R. § 351.201(a) to apply RIF regulations:

when it releases a competing employee from his/her competitive level by separation, demotion, furlough for more than 30 days, or reassignment requiring displacement, when the release is required because of lack of work, shortage of funds, reorganization, reclassification due to change in duties, or the exercise of reemployment or restoration rights.

The major issue for the Board's consideration in this case is whether a reorganization occurred. Reorganization “means the planned elimination, addition, or redistribution of functions or duties in an organization.” 5 C.F.R. § 351.203(f). As the

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<sup>5</sup> See Board orders dated May 11 and July 16, 28, and 29, 1981, at Tabs 1, 3, 4, and 5 of the record.

<sup>6</sup> Defined at 5 U.S.C. § 2108(3).

Board has previously noted, “reorganization” is a term which is broad enough to cover a multitude of legitimate management considerations, but there must be a change of substance to warrant its recitation as justification for a RIF. *Losure v. Interstate Commerce Commission*, 2 MSPB 361, 363-364 (1980). See also *Fitzgerald v. Hampton*, 467 F.2d 755 (D.C. Cir. 1972); *Keener v. United States*, 165 Ct. Cl. 334, 338 (1964). Thus, the Board must look beyond the reason stated by the agency in order to determine whether a change occurred in fact or whether it was only on paper. *Fitzgerald, supra*, at 758-759; *Losure, supra*. Accordingly, where an appellant whose former position is abolished or reclassified asserts that the duties of his position are the same after the RIF as before it, the Board has consistently examined the totality of the evidence, including the official position descriptions, the parties' testimony, and other evidence of the actual duties of the job.<sup>7</sup> See, e.g., *Ryba v. Department of the Navy*, 18 M.S.P.R. 472 (1983); *Bodrick v. D.C. Government*, 7 MSPB 114 (1981); *Chavez v. General Services Administration*, 5 MSPB 366 (1981); *Phelps v. Department of the Interior*, 4 MSPB 410 (1980).

In the instant case, the ALJ examined the SD and SED jobs as officially described under both Schedules A and C, compared and contrasted specific portions of the language used, discussed the positions of the parties, and cited specific testimony of agency witnesses. See initial decision at 8-16. From this, he concluded that the language in the old and the new position descriptions is “plainly different in some respects,” initial decision at 12, but that agency officials with firsthand knowledge of the way in which the Schedule A positions functioned testified to the effect that the essential characteristics of a Schedule C appointment were attributable to the job as performed under Schedule A. That is, he found from the evidence before him that there was, in fact, no change in duties as a result of the change in the nature of the appointment from Schedule A to Schedule C, and noted that, in a sense, there had not even been a change in qualifications as the agency had argued, because incumbents of the Schedule A positions have been displaced when there has been a change in administration for nearly 30 years.

The Board finds that the agency's petition for review, which is set forth in terms of a challenge to the ALJ's conclusion of law that a reorganization did not occur, for the most part constitutes an attack on his factual finding that there was no change in duties. Where the petitioning party challenges such fact findings, his burden is made more difficult by the deference which the Board gives the presiding official's opportunity to observe the demeanor and hear the testimony of the witnesses. *Weaver v. Department of the Navy*, 2 MSPB 297, 299 (1980). We find that the agency has not made a sufficient showing of specific evidence in the record to demonstrate error. Rather, the

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<sup>7</sup> Cf. *Lester v. U.S. Department of Education*, 18 M.S.P.R. 63 (1983) (the official position of record of the employee who displaces the appellant determines the displacing employee's RIF rights); *Frankel v. Department of Education*, 17 M.S.P.R. 453 (1983) (RIF rights of an appellant on detail stem from his official position assignment and not the detailed position); *Aronson v. Department of the Navy*, 4 MSPB 379 (1980) (in determining whether an appellant is qualified for assignment to other positions, where there is no showing that the position descriptions of those jobs are inaccurate, they are properly relied on as “useful evidence” on the issue).

record amply demonstrates, as the agency itself states in the petition, that the “recommendation was made to the Secretary [of Agriculture] that the positions be designated as Schedule C, on the grounds that that designation more accurately reflected the actual duties and relationships of the position than the Schedule A designation.” Petition for review at 12.

Insofar as the agency's petition in this respect is not directed toward the ALJ's fact findings, we hold that it is insufficient to show error in the initial decision. Because the regulatory definition of reorganization requires that there be a change in “functions or duties”, 5 C.F.R. § 351.203(f),<sup>8</sup> we do not attach determinative weight to the fact that the new position descriptions provide for a better defined relationship with and more direct accountability to the administration, inasmuch as neither of those factors has, under the circumstances of this case, been shown to have created a change in the way in which the duties of the positions were being performed.<sup>9</sup> Moreover, while it is true, as the agency asserts, that the change in appointment from Schedule A to Schedule C would be sufficient to require that the two positions be in different competitive levels,<sup>10</sup> that fact is not dispositive of the issue which is before the Board.<sup>11</sup>

Accordingly, based upon the record in this case, we concur with the ALJ that RIF proceedings were not properly invoked. Although the changed relationships, accountability, tenure, and other such factors which may generally result from appointments under different authorities would be likely to create substantive

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<sup>8</sup> See also Federal Personnel Manual Chapter 351, subchapter 3-5.

<sup>9</sup> By Order dated July 13, 1984, the Board sought the views of the Office of Personnel Management (OPM) on whether the change of the positions from Schedule A to Schedule C necessarily meant that a change in duties occurred. OPM contended, in response, that positions are not changed; rather the Schedule A position is abolished and a new Schedule C job is established to which some of the functions of the Schedule A job are redistributed. Moreover, it contends that “duties” may be defined to include not only the day to day functions of a position but also the performance of such duties within the confidential relationship with one's superiors. Thus, OPM asserts that the creation of the Schedule C job “presupposes a change in ... duties.” For the reasons stated above, under the circumstances of this case, we decline to defer to OPM's position in this regard, which is unsupported by references to the record or to law, rule, regulation, or other authority.

<sup>10</sup> 5 C.F.R. § 351.403(b)(2) provides that “[a]mong excepted positions, each agency shall establish separate competitive levels for positions filled under different appointment authorities.”

<sup>11</sup> The agency also asserts that the ALJ's decision is inconsistent with the Board's decision in *Killingsworth v. Department of Health and Human Services*, 10 MSPB 237 (1982). In that case, the Board determined that the agency's decision to abolish temporary or term excepted service positions and replace them with permanent competitive service positions constituted a reorganization which properly called for the invocation of RIF procedures. Although the facts upon which this conclusion was based were not fully detailed in the decision, to the extent that it may be contrary to the holding of the instant case, our decision in *Killingsworth* is hereby overruled.

differences in the functions or duties in an organization so as to justify a RIF, the record in these cases is simply insufficient to show such changes.

The agency next contends that if the action is found not to be a RIF, it should be viewed as a “conversion and discharge.” Petition at 36. Basically, the agency argues that if, as the ALJ found, no new positions were established, then the Executive Order simply redesignated the Schedule A jobs as Schedule C jobs during appellants’ incumbency. The agency thus asserts that it was unnecessary for it to take any action to abolish the Schedule A positions before appellants could be separated from the Schedule C jobs to which they had been “converted”. Because an employee with a Schedule C appointment is excluded from the coverage of the law on adverse actions,<sup>12</sup> the agency concludes that the discharge was proper and unreviewable.

The agency has put forth a lengthy analysis on the question of whether, in spite of the clear language of 5 U.S.C. § 7511(b)(2), see n. 12, *infra*, the President retains authority to exclude these positions from the coverage of 5 U.S.C. Chapter 75. The Board finds it unnecessary to resolve each point of the agency’s argument in this regard, though, because of our agreement with the ALJ’s conclusions that appellants were not removed from their Schedule A appointments solely as a result of the Executive Order, and that some properly executed personnel action was necessary to divest them of their Schedule A appointments. *Roth v. Brownell*, 215 F.2d 500 (D.C. Cir.), *cert. denied*, 348 U.S. 863 (1954). See also *Saltzman v. United States*, 161 Ct. Cl. 634 (1963). In its response to the Board’s Order, OPM agrees that some action must be taken to effect the separation of the employee, either through RIF or adverse action. While it is true, as the agency points out, that the situation in *Roth* (and, indeed, in *Saltzman*) involved an employee who was changed from the competitive service where he had greater job retention rights, to the excepted service, that fact does not affect our conclusion. Although the employee’s competitive status may determine his entitlement to certain appeal rights,<sup>13</sup> the decisions in both cases were predicated upon findings that neither the President by Executive Order (*Roth*) nor Congress by statute (*Saltman*) had effected the employee’s removal from his prior appointment. Thus, additional actions were necessary to effectuate the employee’s conversion. We find that the same is true here.<sup>14</sup>

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<sup>12</sup> See 5 U.S.C. § 7511(b)(2), providing that persons not covered by the adverse action requirements of law include those whose positions have been determined to be confidential or policy determining by the Office of Personnel Management for positions it has excepted from the competitive service, or by the President for positions excepted by statute.

<sup>13</sup> See *Padilla v. Equal Employment Opportunity Commission*, 18 M.S.P.R. 121, 126 (1983).

<sup>14</sup> In this regard, we note the agency’s earlier position, which accords with our finding here, that “Respondents submit that the [Executive] Order was legal, and that, *in order to effectuate the President’s intent, it was logically and administratively necessary to abolish the Schedule A positions*. The applicable means to fulfill that requirement was through RIF procedures which resulted in appellant’s termination.” (Emphasis added.) See Volume II, Tab 42 of the record,

The agency's final argument is that appellants failed to show harmful error in these actions. This position, however, is based only on the contentions which the Board has here rejected. Accordingly, we will give it no further consideration.

The petitions for review filed on behalf of six of the non-preference eligible appellants, as noted above, assert error in the ALJ's decision because of its failure to reverse their separations. They argue that because they were removed as a result of the application of RIF regulations, and since those regulations provide a right of appeal to the Board, the improper RIF should be reversed.

As a general rule, it is true that "a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." *Securities and Exchange Commission v. Chenery*, 332 U.S. 194 (1947). This rationale has been applied to the action of the Board in reviewing the decision of an employing agency. *Horne v. Merit Systems Protection Board*, 684 F.2d 155 (D.C. Cir. 1982). In that case, the agency had demoted two employees without adherence to RIF procedures. In reviewing the actions, the Board determined that the actions should have been RIFs and examined them as if they had been taken that way. The court found that rather than adjudicate a RIF which never occurred, the Board should have remanded the action to the agency for disposition pursuant to proper (RIF) procedures. However, the court went on to note that "[a] remand would be unnecessary if petitioners had no job tenure rights." *Id.* at 158. In this case, these six appellants do have such rights under the RIF regulations, but not under adverse action procedures. Because the ALJ found that what occurred in these cases was not a RIF but was actually a removal "for cause," in keeping with the court's direction in *Horne*, he examined the appellants' "tenure rights" before determining what disposition was proper. As to the preference eligibles, he found that they had rights which were enforceable by the Board and reversed those actions because of the agency's failure to provide them to appellants. As to the non-preference eligibles, however, as he correctly found, they have no rights under 5 U.S.C. Chapter 75 which the Board may enforce. Nor would appellants' assertion of partisan political reasons for their removal bring the matter within the scope of the Board's authority, in the absence of an otherwise appealable matter. See, e.g., *Wren v. Department of the Army*, 2 MSPB 350 (1980). Thus, those appeals were properly dismissed.

Accordingly, each of the petitions for review is hereby DENIED.<sup>15</sup>

The agency is hereby ORDERED to cancel the separation actions of the twenty four appellants, as directed by the ALJ, to award backpay and benefits in accordance

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"Respondent's Statement of Disputed Facts, Summary of Evidence, and Identification of Witnesses," at 3, paragraph 9.

<sup>15</sup> In light of this disposition we have not addressed the merits of appellants' allegation, raised to the ALJ, that the action violated their First Amendment freedom of political affiliation. Nor do we find it necessary to adjudicate appellants' claim that the Board has the authority to review the propriety of the Executive Order. As to the preference eligible employees, having reversed the RIF, the propriety of that Order is moot, and as to the non-preference eligibles, it would provide no basis for asserting jurisdiction over their appeals.

with 5 C.F.R. § 550.805, and to submit proof of compliance with this order to the Office of the Clerk, Merit Systems Protection Board, within twenty days of receipt of this decision. In accordance with 5 C.F.R. § 1201.181(a), any petition for enforcement of this order must be filed with the ALJ.

This is the final decision of the Merit Systems Protection Board in this case. The initial decision shall become final five days from the date of this Order. 5 C.F.R. § 1201.113(c).

The appellants are hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review, if the Court has jurisdiction, of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after each appellant's receipt of this order.

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

## APPENDIX

| <b>Appellant</b>       | <b>Regional Office</b><br><b>Docket Number</b> |
|------------------------|--|
| John F. Apitz          | CH03518110398                                  |
| Robert L. Blalock      | AT03518110533                                  |
| Wallace D. Brunton     | CH03518110374                                  |
| Billy B. Burke         | PH03518110410                                  |
| William E. Burnette    | AT03518110628                                  |
| Brian D. Burns         | BN03518110121                                  |
| Drew Cloud             | DA03518110448                                  |
| Ralph H Cochran        | CH03518110533                                  |
| William E. Curry       | BN03518110105                                  |
| Lawrence E. Dahl       | CH03518110460                                  |
| Frederick W. Defield   | SL03518110134                                  |
| John T. Denver         | SL03518110138                                  |
| Wallace B. Edland      | DE03518110314                                  |
| James W. Facemire      | PH03518110394                                  |
| Stewart G. Huber       | CH03518110399                                  |
| Loyd R. Jones          | CH03518110389                                  |
| Carl J. Kaufman        | PH03518110391                                  |
| J. Fred King           | PH03518110495                                  |
| Rudolph W. Knoll       | DE03518110313                                  |
| Myron A. Maiewski      | BN03518110108                                  |
| Joe T. McCarter        | SE03518110135                                  |
| William L. O'Daniel    | CH03518110376                                  |
| Carl J. Otto           | DE03518110154                                  |
| Lowell A. Pannell      | SF03518110850                                  |
| Clyde R. Payne         | AT03518110639                                  |
| Edward A. Ragland      | PH03518110395                                  |
| Keith Sattler          | SE03518110137                                  |
| Freling H. Scarborough | AT03518110629                                  |
| Karl G. Smith          | AT03518110561                                  |
| Wayne Testerman        | DE03518110165                                  |
| D.L. Triggs            | AT03518110605                                  |
| Jack M. Weiland        | DE03518110174                                  |