UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

FRANK BRANDON
v.
DEPARTMENT OF THE ARMY

Docket No.
DC035109020

OPINION AND ORDER

The petitioner, Frank Brandon, appealed a reduction in force (RIF) which resulted in the abolishment of his position as an employee development specialist, GS-235-13. Petitioner was offered, and he accepted, a position as management analyst, GS-343-12. Petitioner's appeal was heard in the Washington, D.C. Field Office, and the presiding official sustained the RIF. Petitioner's attorney then petitioned the Board to review the initial decision.

In the petition for review the petitioner restated the argument presented to the presiding official that his position was abolished in violation of agency regulations. Specifically, he argued that the agency was obliged to conform to a manpower survey conducted by the Department of the Army Inspector General in October 1978. The survey allegedly "validated" his position and mandated abolishment of the personnel clerk, GS-5, position located in his office. He further claimed that this mandatory survey was not followed because the agency wished to keep the personnel clerk since the clerk was younger.

The presiding official found that the manpower survey upon which petitioner relied was a survey of the functions of the unit as of the day the survey was made, and that it only determined the number of positions required to carry out the functions of the unit. Recommendations of the survey team as to abolishment of specific positions were not mandatory, and the team did not validate any individual position. Therefore, the presiding official concluded that the agency did have authority to decide which positions to abolish or restructure when the survey indicated that a unit was overstaffed.

The arguments in the petition go to the weight of the evidence. The petition, however, ignores the testimony of the Chief of Military Personnel and Manpower Management, who was responsible for the survey, as well as the other evidence which the presiding official found persuasive. Petitioner has not identified any new evidence which would refute the evidence the presiding official

found credible. *See Weaver v. Department of the Navy*, 2 MSPB 297 (1980).

Nevertheless, it appears that the presiding official erroneously held that the appellant has the burden to establish that a RIF action was "based on reasons other than for reducing the work force." Initial Decision 2. We rejected this concept in *Losure v. Interstate Commerce Commission*, 2 MSPB 361 (1980). Since Losure had not been decided at the time the initial decision was rendered, or when the petition was filed, the petition will be granted in order to consider the impact of *Losure* on this case.

In *Losure* we held that an agency must support a RIF action by a preponderance of evidence as required by 5 U.S.C. 7701(c)(1)(B). Although an agency may initially establish that the regulations were properly invoked, thereby shifting the burden of going forward with rebuttal evidence to the employee, the burden of persuasion never shifts from the agency. *Losure*, 366. Therefore, although the presiding official found that the RIF was not in violation of agency regulations and was taken for valid reasons, she erroneously applied the burden of proof to appellant's rebuttal evidence.

After considering the record and reviewing the initial decision, we conclude that it is unnecessary to remand this case. The agency's evidence clearly amounted to a preponderance of the evidence showing that the action was proper. Appellant's arguments and evidence, which should have been considered in rebuttal, are insufficient to rebut the agency's case.

In this case, unlike *Losure*, the duties of the position abolished were genuinely redistributed to other employees in the personnel office. The position was not, in effect, transferred to another person in order to get rid of appellant. Certainly, such a reorganization is a permissible reason for a reduction in force. 5 C.F.R. 351.201(a). Therefore, we conclude that the agency action was proper.

Finally appellant contends that he made a prima facie case of age discrimination.[1] Appellant's discrimination claim centered on the allegation that the agency was obliged to abolish the personnel clerk, GS-5, position and that his job had been validated. Since we found that the agency was not obligated to do so, we find no error in the presiding official's conclusion that the appellant failed to establish a prima facie case of discrimination.

Accordingly, the initial decision is modified as set forth above and, as modified, is affirmed.

This is the final decision of the Merit Systems Protection Board.

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[1] Appellant's claim of discrimination is cognizable as an affirmative defense, which he must establish. *See* 5 U.S.C. 7701(c)(2)(B), 2302(b)(1)(B), and 5 C.F.R. 1201.56(b)(2).

The appellant has the right to petition the Equal Employment Opportunity Commission to consider this decision on the issue of discrimination. The appellant also has the right to file a civil action under the antidiscrimination laws in any appropriate U.S. District Court. Either a petition to EEOC or a civil action in a U.S. District Court must be filed no later than 30 days after the appellant's receipt of this decision.

Except for actions filed under the antidiscrimination laws, a petition for judicial review of this decision must be filed in the appropriate U.S. Court of Appeals or in the U.S. Court of Claims no later than 30 days after receipt of notice of the Board's final decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *November 10, 1980*