

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

DALE CLICK)	
)	
v.)	Docket No. PH03518110396
)	EEOC Petition No. 03820132
DEPARTMENT OF HEALTH AND)	
HUMAN SERVICES)	
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OPINION AND ORDER

This case is before the Board pursuant to 5 U.S.C. § 7702(c) for reconsideration of appellant's allegation that the agency's reduction-in-force action (hereinafter referred to as RIF) was effected for improper reasons. Appellant, a GS-2 clerk, asserted that the agency discriminated against him on the basis of handicap when it abolished his position.

In an initial decision of August 6, 1981, a presiding official in the Board's Philadelphia Regional Office determined that the agency had established by a preponderance of the evidence that the reason for abolishment of appellant's position was a lack of funds. The presiding official also determined that, while a first line supervisor's disparate treatment of appellant possibly constituted discrimination, appellant failed to establish a nexus between his supervisor's actions and the RIF. Accordingly, the presiding official affirmed the agency's action.

The Board, in an order of August 27, 1982, denied appellant's petition for review. Appellant then requested consideration by the Equal Employment Opportunity Commission (hereinafter EEOC).

Based upon its review of the record, the EEOC concluded that the RIF action was improperly motivated by a discriminatory animus toward appellant's handicap. The EEOC referred the matter to the Board for further consideration in accordance with 5 U.S.C. § 7702(b)(5)(B).

The Board's authority in this type of case is limited by 5 U.S.C. § 7702(c). The Board must concur in the Commission's decision unless the Board finds as a matter of law that:

(A) the Commission decision constitutes an incorrect interpretation of any provision of civil service law, rule or regulation or policy directive, or

(B) the Commission decision involving such provision is not supported by the evidence in the record as a whole

Because the Commission's decision does not misinterpret any provision of civil service law, rule, regulation or policy directive and because the Commission's decision is supported by the record as a whole, the Board concurs in the Commission's decision. Accordingly, the agency is ORDERED to CANCEL the personnel action separating appellant.

The agency is hereby ORDERED to submit written verification of its compliance with this order to the Secretary of the Board within twenty (20) days of the date of this Order. In the event of agency noncompliance, a petition for enforcement may be filed with the Philadelphia Regional Office pursuant to 5 C.F.R. § 1201.181(a).

If appellant chooses to contest the Board's final decision on the issue of discrimination, he may obtain judicial review of all issues by filing a petition with an appropriate United States district court within 30 days after the date of receipt of the decision. 5 U.S.C. § 7703(b)(2). In cases involving discrimination claims based on race, color, religion, sex, national origin, or handicapping condition, the appellant has the right to request the court to appoint an attorney to represent him and to waive any requirement of prepayment of fees, costs, or other security. 5 U.S.C. § 2000e5(f)-(k) and 29 U.S.C. § 794a.

If appellant chooses not to contest the Board's final decision on the discrimination issue and has not filed a petition with a United States district court, he may obtain judicial review of the other issues by filing a petition with the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The statute requires by 5 U.S.C. § 7703(b)(1) that a petition for judicial review must be received by the court no later than 30 days after the appellant's receipt of this order.

FOR THE BOARD:

March 19, 1984
Date
Washington, D.C.

Robert E. Taylor
Robert E. Taylor
Secretary