UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

GORDON C. FACER, appellant, v. DEPARTMENT OF ENERGY, agency.	DOCKET NUMBER DC0351831O289
	DATE: 9 NOV 1984

ORDER

Appellant was separated from his Senior Executive Service (SES) position by reduction in force (RIF) after declining an offer of assignment to a lower-graded position at the agency. Appellant's position was determined to be surplus and therefore was abolished.

The presiding official sustained the RIF action, finding that the RIF had been invoked for a legitimate management reason and that appellant failed to demonstrate that 5 U.S.C. § 3592(b)(1) (1982) precluded his separation because 120 days had not elapsed following the appointment of the new head of the agency. The presiding official found that it would be unreasonable to conclude that Congress intended to delay a RIF which had been initiated prior to the appointment of the agency head. She analogized the situation to the exception for disciplinary actions initiated before such an appointment. See 5 C.F.R. § 3592(b)(2)(B) (1982).

Appellant has filed a petition for review, alleging that the presiding official erred in not finding that he

was occupying a position distinct from the one that was designated as the SES position when he was converted to that status. He maintains that the position the agency declared surplus, known as the Special Assistant position, had not been occupied since 1973. Thus, he claims that the agency abolished an unoccupied SES position. Further, he contends that the actual SES position he occupied during the intervening period was that of Deputy Director, Safety, Environment and Emergency Actions. He requests that the Board review the positions and position titles involved so that an accurate determination of his status at the time of his separation can be made. Appellant also contends that the presiding official has erroneously interpreted 5 U.S.C. § 3592(b). He argues that the clear language of the statute is applicable to a career SES incumbent involuntarily separated by reduction in force.

The agency responded to the petition, arguing that the appellant had not met the criteria in 5 C.F.R. § 1201.115 (1983) because he failed to present new and material evidence which warrants an outcome different from that ordered by the presiding official and because the appellant had merely stated his disagreement with the presiding official's decision. The agency also contended that the presiding official's interpretation of 5 U.S.C. § 3592(b) (1982) is correct. The Office of Personnel Management (OPM) also filed

a brief in intervention. See 5 U.S.C. § 7701(d)(1) (1982). OPM maintains that the presiding official correctly found that the agency properly considered the appellant under his official position of record in determining his RIF rights. Further, OPM argues that appellant's removal pursuant to a reduction in force did not violate 5 U.S.C. § 3592(b) (1982) because that statutory restriction does not cover RIF actions. It is OPM's position that the fact that Congress enacted a separate RIF law for SES positions three years after it had enacted 5 U.S.C. § 3592(b) demonstrates that it did not have RIF removals for SES employees in mind when it enacted the 5 U.S.C. § 3592(b) restriction.

For the reasons discussed below, the petition for review is hereby GRANTED. 5 U.S.C. § 7701(e)(1).

First, although appellant argues he has not occupied the Special Assistant position since 1973, the record clearly shows that when he was converted to an SES position in 1979, the conversion involved the Special Assistant position. If, as appellant claims, he was actually performing the duties of a Deputy Director, Safety, Environment and Emergency Actions, a position which was consistently rejected for SES consideration, then it is clear that in the intervening years appellant's duties did change and, as such, a RIF action was properly invoked. See Brace v. U.S. Department of Housing and Urban Development, 11 MSPB 451,

453 (1982). Further, it has been consistently held by the Board that an employee has only those rights incident to the position to which he or she is officially appointed whether or not the employee is performing another job in an acting capacity. Mundy v. Department of the Defense, 4 MSPB 358, 362 (1981); Chleapas v. Department of Health, Education and Welfare, 1 MSPB 464 (1980).

Appellant's arguments and characterizations of the evidence represent a mere rehashing of those issues and disagreement with the presiding official's findings of fact and interpretation of the evidence. The Board's review of the presiding official's findings of fact and determinations will ordinarily be undertaken only when the petitioner makes a showing consistent with 5 C.F.R. § 1201.115(b), which requires a demonstration that the initial decision is based on an erroneous interpretation or application of the statutory requirements governing the weight of the evidence. Weaver v. Department of the Navy, 2 MSPB 297, 298-299 (1980). Our review of the record and the presiding official's reasoning does not disclose a misapplication of the statutory burden of proof or other cause warranting reversal of the determination on the legitimacy of the instant RIF action. See Caracciolo v. Department of Education, MSPB Docket No. DC03518210340 (April 2, 1984); Weaver, 2 MSPB at 297.

Pub. L. 97-35, 95 Stat. 756 (1981), established the statutory basis for a RIF system in the Senior Executive Service. 5 U.S.C. § 3595 (1982). This section was later amended by Pub. L. 97-346, 96 Stat. 1650 (1982). The amendment, codified at subsection 3595(b)(5), provided that an individual who, like the appellant, was a career appointee on May 31, 1981, can be removed from the Senior Executive Service and the civil service due to RIF after the 120-day period specified in paragraph (b)(4)(B). However, for the removal to take effect, the Director of OPM must certify to the Committee on Post Office and Civil Service of the House of Representatives and the Committee on Governmental Affairs of the Senate no later than 30 days prior to the effective date of such removal that the Office has taken all reasonable steps but was unable to place the career appointee in another Senior Executive Service position. In the instant case, the evidence plainly demonstrates that the foregoing prerequisites took place prior to appellant's separation. Accordingly, we find that the agency complied with the provisions of 5 U.S.C. § 3595 (1982).

Appellant maintains that 5 U.S.C. § 3592(b)(1) precluded his involuntary removal pursuant to a RIF on January 7, 1983, because the agency had acquired a new head in December, 1982,

less than 120 days before his separation.*/ Appellant's basic argument is that since his removal by RIF was involuntary, then the restriction in section (b)(1)(A) applies to his case and his separation is not in accordance with law. The agency maintains that the statute allows appellant's removal because his most immediate supervisor, who was a noncareer appointee and who had the authority to remove him under the RIF was employed over 120 days at the time of appellant's separation. The agency argues that appellant's removal was in compliance with Section 3592(b) because the utilization of the word "or" between (b)(1)(A) and (b)(1)(B) means that only one of the two situations needs to exist in order to permit appellant's separation. In her initial decision, the presiding official in effect added another exception to paragraph (b)(2) by including a RIF action initiated before an appointment referred to in paragraph (1) of the subsection. OPM, on the other hand, argues that 5 U.S.C. § 3592 does not apply to an SES reduction in force. After considering the statutory construction and the legislative history concerning the enactment of sections 3592 and 3595, we agree with the position of the Office of Personnel Management.

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*/ The agency and OPM contend that the new head of the Department of Energy was appointed in November, 1983. Because there is no dispute that appellant was separated within 120 days after the appointment of the head of the agency, the exact date of the appointment is immaterial.

Section 3595 was included in the Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, 95 Stat. 756. In addition to establishing RIF procedures, that act also amended section 3393 of Title 5, United States Code, by inserting at the end thereof the following new subsection:

> (g) A career appointee may not be removed from the Senior Executive Service or civil service except in accordance with the applicable provisions of sections 1207, 3592, 3595, 7532, or 7543 of this title.

5 U.S.C. § 7542 was also amended by the insertion of "or 3595" after "3592." That section now states:

> 7542. Actions Covered.
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> This subchapter applies to a removal from the civil Service or suspension for more than 14 days, but does not apply to an action initiated under section 1206 of this title, to a suspension or removal under section 7532 of this title, or to a removal under section 3592 or 3595 of this title.

We find that the inclusion of a section 3595 removal as a distinct action from a 3592 removal demonstrates that Congress considered them separate actions. This conclusion is further bolstered by the House Budget Committee Report on the RIF proposals which ultimately became law. The Committee therein recognized that the legal authorities for removal of career executives in SES were clarified by the addition of a new subsection (g). H.R. Rep. No. 158, 97th Cong., 2d Sess (1981). Further, it noted that section 3592

only applies to performance-based removals for less than fully successful executive performance. Id. at 49, 51. The addition of new regulations for RIF removals is recognized as an additional removal mechanism. Id., at 50. The Office of Personnel Management regulations at Part 359, Subpart E, Title 5, Code of Federal Regulations, likewise interpret 5 U.S.C. 3592 as governing removal of career appointees for less than fully successful executive performance.

The well-established rule is that in reviewing an agency's application of a statutory term of which it has administrative charge "the judicial role is narrow." Beth Israel Hospital v. NLRB, 437 U.S. 483, 501 (1978). This limited judicial role assumes an adequately articulated administrative decision interpreting the relevant statutory law within a range of reasonableness. See Federal Election Campaign Commission v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 37 (1981). Congress provided that the Office of Personnel Management shall prescribe regulations to carry out the purpose of Subchapter V, Removal, Reinstatement and Guaranteed Placement in the Senior Executive Service, 5 U.S.C. 3596 (1982). Based on our review of the pertinent legislative history, and after giving due deference to OPM's interpretation of the statutory terms which it is responsible for administering, we find

that the restriction of 5 U.S.C. § 3592(b)(1) is not applicable to a removal pursuant to a RIF. Therefore, appellant's claim that the agency's action is not in accordance with law is found to be without merit.

Accordingly, the initial decision is AFFIRMED as MODIFIED. This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c). The appellant is 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 the appellant's receipt of this order.

FOR THE BOARD:

Stephen E. Manrose

Stephen E. Manrose
Acting Clerk of the Board

Washington, D.C.