BETTY FOSTER
v.
DEPARTMENT OF TRANSPORTATION, U.S. COAST GUARD

Docket No.
DC03518010158

OPINION AND ORDER

Appellant was reduced in grade from the position of Manpower Analyst, GS-12, to Program Analyst, GS-11, by reduction-in-force (RIF) procedures.[1] She appealed to the Board's Washington, D.C. Regional Office, and the presiding official sustained the agency's action. Appellant has petitioned for review, alleging that the presiding official erred in finding proper and nondiscriminatory the agency's invocation of RIF procedures. The petition for review is GRANTED.

The agency determined that its budget for Fiscal Year 1980 required the abolishment of two civilian positions from its Headquarters office. "Shortage of funds" is a permissible reason for initiating RIF procedures. 5 C.F.R. § 351.201(a). Thus we find that the action was taken for a legitimate management reason.

Appellant alleged that the agency's selection of her position for abolishment was arbitrary. Appellant's Branch Chief and Division Chief testified as to their reasons for nominating her position for abolishment. H. T. at 85, 109, 150–151. In their testimony they discussed their considerations of the relative ease of redistributing appellant's duties as opposed to the difficulties involved in redistributing duties assigned to other positions. The Board finds these to be valid considerations when budgetary constraints require an agency to abolish a position. *See Gibson v. United States*, 176 Ct. Cl. 102, 109 (1966).

Appellant, who was the only person listed in her competitive level, also alleged that her competitive level was defined too narrowly. The applicable regulation, 5 C.F.R. § 351.403(a) states, in pertinent part, that competitive levels shall consist of:

> all positions in a competitive area and in the same grade or occupational level which are sufficiently alike in qualification requirements, duties, responsibilities, pay schedules, and working conditions, so that an agency readily may assign the incumbent of any one position to any of the other positions without changing the terms of his appointment or unduly interrupting the work program.

[1]She received the pay retention benefit provided by 5 U.S.C. 5363.

According to the provisions of the Federal Personnel Manual (FPM) which were in effect at the time the RIF was effected,[2] a competitive level consists of

> the jobs so similar in all important respects that the agency readily can move an employee from one to another without significant training and without unduly interrupting the work program . . .. A level may consist of only one job when that job is so nearly unique that it is not interchangeable with similar jobs. Characteristics shared by all positions in a competitive level are similarity of duties, responsibilities, pay schedule, and terms of appointment: and similarity of requirements for experience, training, skills, and aptitudes.

The agency's witness testified that there were other positions in the agency requiring the same knowledge, skills and abilities as appellant's position, and identified three such positions. In addition, the witness testified that there were other positions (not identified) in which appellant could have performed satisfactorily after a period of two to three months. He testified that he had not considered including any of these positions, or any other positions, within appellant's competitive level because that level had been determined when the position had been classified in 1974. H. T. at 42–43; *see also* Agency's Summation, 18 September 1980 at 2. The Board addressed a similar contention in *MacDonald v. Environmental Protection Agency*, 1 MSPB 456 (1980), stating:

> A distinction must be made, however, between the mechanics of classifying a position, and an analytical comparison of positions to determine whether they are identical or substantially similar. The fact that two positions under consideration have different titles does not necessarily demonstrate that the positions are dissimilar.

In addition, FPM Ch. 351, 4–3(a), *supra*, points out that "sound determination" requiring "careful judgment" is necessary when examining the characteristics of positions in order to determine the competitive level. The agency's witness testified, however, that he determined the competitive level based on an "automatic process," namely, upon the classification of 1974. H. T. at 59. In view of the agency's concession that appellant's position was basically similar to at least three other positions which were not included within her competitive level or even considered for inclusion, the Board agrees with appellant that the agency failed to prove that it defined her competitive level correctly.

The agency has the burden of proving, by a preponderance of the evidence, the proper invocation of substantive RIF procedures which determine appellant's entitlement to continued employment. *See Losure*

[2]FPM Ch. 351, 4–3(a) (February 28, 1973). Although the Office of Personnel Management has revised FPM Ch. 351 effective July 1, 1981, the provisions in effect at the time of the action control in this appeal. *Matthews v. Office of Personnel Management*, 4 MSPB 482 (1980).

v. ICC, 2 MSPB 361, 365–366 (1980). As is true of the agency's burden of persuasion regarding the *bona fides* of its reasons for taking a RIF action, *see id.*, 366, its initial evidence as to the proper application of procedures would normally suffice to meet its burden of persuasion on that element of its decision as well. In this case, however, appellant elicited evidence sufficiently rebutting the propriety of the agency's definition of her competitive level.[3]

Since appellant was the only person in her competitive level, she was the only one listed on her retention register. *See* 5 C.F.R. § 351.404. Despite appellant's repeated requests, the agency, stating that it did not keep standing retention registers, did not produce any other retention registers for her to examine. However, according to FPM Ch. 351, App. A, A-1(a) (November 20, 1964, revised July 1969) (effective at the time of the action),

> An agency must maintain at all times the records necessary to determine the retention standing of its competing employees . . .. The record should be open to the employees to an extent sufficient to settle as far as possible all of their questions about reduction in force. The employee is entitled to see not only the register and related records for his own competitive level, but also for levels in which there are employees who may displace him, and for levels into which he believes he may be entitled to displace.

The agency did provide computer printouts of positions, which appellant alleged to be incomplete and inaccurate. By means of the printouts, appellant identified positions which she asserted should have been included in her competitive level. The presiding official's review of those positions revealed that among them, there were no GS-12 positions whose incumbents would have stood below appellant on the retention register even if they had been placed in the same competitive level. This analysis is insufficient under the facts of this case.

Where it is possible for the Board to ascertain from the record just which positions should have been included in what it finds to have been an incorrectly defined competitive level, and, further, where its review of those positions reveals that the agency's correct definition of the competitive level would have made no difference affecting the employee's substantive rights, the agency's action in such a case will not be reversed on the basis of such an error. However, the instant case does not present that situation. On the record in this case, the Board cannot find that appellant's position was so unique as to justify a one-position

[3]The presiding official has discretion to require an appellant to identify any alleged impropriety in the agency's invocation or application of the RIF regulations with sufficient specificity to enable the agency to address the contested matters in its presentation of evidence. *See Losure, id.* 366, n.6. In the instant case appellant immediately contested her one-person competitive level to proper agency officials. The agency was not surprised by this assertion at the Board's hearing, (H. T. at 44), nor has it so contended.

competitive level. However, the record does not reveal what the proper definition of appellant's competitive level should have been. For this reason, the Board is unable to determine whether the agency would have arrived at the same decision had it correctly defined appellant's competitive level. Accordingly, the Board finds that the agency failed to prove, by the preponderance of the evidence, that it afforded appellant all of the rights to which she was substantively entitled.

Appellant also asserts in her petition that the presiding official erred in finding that she had not demonstrated her claim that the action had been based upon age and sex discrimination. However, the Board agrees with the presiding official's adjudication of those issues.

Accordingly, the initial decision is REVERSED, and the agency's action is NOT SUSTAINED. The agency is hereby ORDERED to submit written verification of its compliance with this Order to the Board's Washington, D.C. Regional Office within ten (10) days of its receipt hereof. This is the final decision of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

Appellant is hereby notified of the right to petition the Equal Employment Opportunity Commission to consider the Board's decision on the issue of discrimination. A petition must be filed with the Commission no later than thirty (30) days after appellant's receipt of this order.

Appellant is hereby also notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. § 7703. Appellants who file a civil action in a U.S. District Court concerning the Board's decision on the issue of discrimination have the right to request the court to appoint a lawyer to represent them, and to request that prepayment of fees, costs, or security be waived. A civil action or petition for judicial review must be filed in an appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

WASHINGTON, D.C., *September 29,1981*