UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

GROVER L. GRIFFIN, *et al.*,
v.
DEPARTMENT OF AGRICULTURE

Docket No.
SF035199011

OPINION AND ORDER

Petitioners were variously reassigned, downgraded or separated pursuant to a reduction-in-force (RIF) at the Western Regional Research Center of the Department of Agriculture's Science and Education Administration (the agency). They each appealed under 5 C.F.R. § 351.901, contending principally that (1) the RIF was unlawful because it resulted from contracting out the services they had been performing, not from lack of work or funds or from an internal reorganization; (2) the agency's decision to contract out those services was based on erroneous calculations of the comparative cost of in-house and contracted performance; and (3) the manner in which the RIF was undertaken and its impact on working conditions at the facility violated the Government's health and safety requirements and the agancy's labor relations obligations.

The individual appeals were consolidated for hearing before a presiding official of the Board's San Francisco Field Office, who thereafter issued four initial decisions, grouping the appeals that involved similar personnel actions. All the agency actions were sustained by those initial decisions, which petitioners (identified in Appendix A) have asked the Board to review on the same grounds presented to the presiding official. In addition, petitioners contend that the presiding official violated 5 C.F.R. § 1201.56 in requiring them to present their "affirmative defense" on the contracting-out issue first at the hearing, prior to the agency's evidentiary presentation.[1]

[1] *Petitioner Lievsay also contends, as he did before the presiding official, that the agency improperly failed to offer his reassignment to the positions of Food Processor WG–5447–10 and/or Agricultural Products Processing Equipment Operator WG–5444–6. Upon reviewing the pertinent position descriptions, Mr. Lievsay's personnel folder and his training and experience as reflected in his qualifications statement, and hearing Mr. Lievsay's testimony, the presiding official found no error by the agency in this respect. The petition for review does not identify any allegedly erroneous interpretation of statute or regulation in the initial decision on this matter, and we therefore decline to review the intitial decision on this issue. See 5 C.F.R. § 1201.115.*

It is undisputed that the RIF actions resulted from the agency's decision to contract out janitorial and grounds maintenance functions and to reduce other industrial-commerical activities not directly a part of its agricultural research program. Petitioners assert that since the same or similar duties are now being carried out for the agency by private sector personnel, the abolition of their agency positions cannot properly be termed the result of a "reorganization" or be attributed to "lack of work" or other reason for justifying a RIF as provided in 5 C.F.R. § 351.201(a).

The difficulty with petitioner's contention is that the federal courts have recently rejected it under indistinguishable circumstances. In *Local 2855, AFGE (AFL-CIO)* v. *United States,* 602 F.2d 574 (3d Cir. 1979), the Third Circuit expressly held that "Elimination of the plaintiffs' jobs through the decision to contract out" is the result of "just such a reorganization" as justifies RIF actions pursuant to 5 C.F.R. § 351.201(a), and "is thus not assailable on this ground." 602 F.2d at 583. To the same effect see *AFGE, Local 1872* v. *Stetson,* 85 CCH Lab. Cas. ¶33,819 (D.D.C. 1979); *AFGE* v. *Hoffman,* 427 F. Supp. 1048 (N.D.Ala. 1976). Indeed, even if the agency's underlying decision to contract out were contrary to OMB Circular A-76, agency regulations, the Veterans Preference Act, and the Service Contract Act, as petitioners contend (but we do not decide),[2] that would not confer on petitioners the right to challenge that decision here under 5 C.F.R. Part 351, which is the exclusive source of this Board's appellate jurisdiction in RIF cases. See *AFGE* v. *Hoffman, supra,* 427 F. Supp. at 1086–1088. Such a defect in the agency's underlying exercise of managerial discretion would not make the RIF actions any less the result of a "reoganization" under § 351.201(a), nor would it prevent the RIF actions themselves from according properly with law (assuming that all requirements of 5 U.S.C. § 3502 and 5 C.F.R. Part 351 have been satisfied).

Once it has been ascertained that an agency has in fact invoked the RIF regulations for one of the management reasons specified in 5 C.F.R. § 351.201(a), as the above-cited judicial precedents oblige

[2] Petitioners have not specified any particular respects in which the challenged actions allegedly violated the referenced authorities. The agency regulations referred to, Department of Agriculture AM 430-3, contain no restriction upon management's contracting-out authority or upon the term "reorganization" in Part 351, but merely apply to the agency the requirements of Part 351. Contentions of employee representatives relating to OMB Circular A-76, the Veterans Preference Act, and the Service Contract Act in similar circumstances have been rejected in the cases cited above and in *AFGE Local 1668* v. *Dunn,* 561 F.2d 1310 (9th Cir. 1977). See also *AFGE, Local 1815* v. *Alexander,* Civ. Action No. 77-1727 (D.D.C. July 25, 1979). OMB Circular A-76 is a policy or managerial tool to aid the exercise of agencies' discretion; it does not create a rule of law, right of action, or confer any procedural benefits. *AFGE, Local 1872* v. *Stetson, supra.*

us to conclude in this case, this Board has no authority to review the management considerations which underlie that exercise of agency discretion.[3] In those circumstances, "The decision whether a particular position is to be preserved or abolished is for the agency to make." *Local 2855, AFGE (AFL-CIO)* v. *United States, supra,* 602 F.2d at 583.

Therefore, since the RIFs in this case resulted from a "reorganization" within the meaning of 5 C.F.R. § 351.201(a), the presiding official properly declined to review the comparative costs of the agency's in-house and contracted services. The evaluation of such costs is a matter committed by law to agency discretion, not reviewable here or in the courts. *See Local 2855, AFGE (AFL-CIO)* v. *United States, supra; AFGE, Local 1872* v. *Stetson, supra; AFGE* v. *Hoffman, supra.* Similarly, since Part 351 does not provide for appeals to this Board of disputes over health, safety, and general labor relations obligations, the presiding official properly determined that those issues also are outside the Board's jurisdiction under 5 U.S.C. § 1205(a).

The contracting-out issue not being within the Board's appellate jurisdiction, petitioners' contentions on that issue could not constitute an "affirmative defense" to the RIF actions as petitioners have assumed in their further contention that the presiding official improperly required them to present their evidence first on that issue.[4] In any event, the presiding official acted within his discretion under the Board's hearing procedures in regulating the order of proof in the interests of fairness and expedition so that the agency could address the precise issues purportedly raised by the appellants.[5] As we have observed in another RIF appeal decided this day:

"[I]n controlling the course of the hearing under 5 C.F.R. § 1201.41(b), the presiding official has discretion, for example at a prehearing conference and/or by regulating the order of proof at the hearing, to require the appellant to identify the alleged im-

[3] OPM's long-established gloss on § 351.201 states: "Planning the work program and organizing the work force to accomplish agency objectives within available resources are management responsibilities. Only the agency can decide what positions are required, where they are to be located, and when they are to be filled, abolished, or vacated. The agency determines when there is a surplus of employees at a particular location in a particular kind of work." Federal Personnel Manual ch. 351, subch. 1-2c (1968). Furthermore, "The decisions on whether a reduction is necessary, which and how many jobs are abolished, and when the reduction is made, are management decisions of the agency and ordinarily are not reviewable. . . ." *Id.*, subch. 2-7a.

[4] Actually, the record shows that the agency presented the first witness who testified as to the reasons for the RIF, viz., need for increased support funds for the agency's scientific mission, need for funding flexibility, a change in the agency's research mission, and the service contracts. Tr. 8, 14–54.

[5] See Tr. 224.

propriety 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. Such regulation of the order of proof does not affect the burden of persuasion. This discretion should normally be exercised when the petition for appeal does not adequately disclose the specific grounds on which the RIF action is challenged." *Losure* v. *Interstate Commerce Commission,* 2 MSPB 361, 366 n.6 (1980).

We have carefully examined all other issues raised in the petitions for review, and find that none meets the criteria set forth in 5 C.F.R. § 1201.115.

Accordingly, the Board hereby DENIES the petitions for review.

This is the final decision of the Merit Systems protection Board. Petitioners are hereby advised that they may file a civil action in an appropriate U.S. Court of Appeals or the Court of Claims within thirty (30) days of receipt of this decision.

For the Board:

RONALD P. WERTHEIM.

June 2, 1980.

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

San Francisco Regional Office

GROVER L. GRIFFIN, *et al.*,

v.

U.S. DEPARTMENT OF AGRICULTURE

Decision Number: SF035199011

Date: August 20, 1979

INTRODUCTION

Appellants Grover L. Griffin, Ples W. Jackson, Van L. Johnson, Werner Schultz, and Raymond Souza filed appeals on April 24, 1979 from the actions of the agency in separating them by reduction in force from the Western Regional Research Center, Albany, California, effective April 7, 1979.

JURISDICTION

Since these actions were commenced in the Department of Agriculture subsequent to January 10, 1979, they are governed by

the provisions of the Civil Service Reform Act of 1978. See Title IX, section 902(b) (92 Stat. at 1224). Under 5 U.S.C. § 7511 *et seq.*, the statutory rights of appeal for employees who have been separated from Federal employment are set out. Excluded from coverage are employees who are the subjects of "a reduction in force action under section 3502 of this title." (See 5 U.S.C. § 7512.) Therefore, appellants have no statutory rights of appeal to the Board.

However, certain regulatory rights of appeal to the Board may be provided by the Office of Personnel Management under 5 U.S.C. § 1205(a)(1). See also 5 C.F.R. § 1201.3(a).

By regulations issued December 29, 1978, provision was made for certain regulatory rights of appeal to the Board. See 43 FR 60857 and 5 C.F.R. §772.301. Included in these regulations was 5 C.F.R. 351 I governing reductions in force. Section 351.901(a) provides that an employee who has received a notice of specific action may appeal if (s)he believes the provisions of 5 C.F.R. 351 have not been correctly applied.

Inasmuch as appellants received individual specific notices on April 3, 1979 and were affected by reduction-in-force actions on April 7, 1979, I find they are entitled to appeal their separations to the Merit Systems Protection Board (5 U.S.C. § 1205(a)(1), 5 C.F.R. § 351.901(a)).

I have consolidated the appeals for concurrent adjudication (5 U.S.C. § 7701(f)).

ANALYSIS AND FINDINGS

By individual memoranda dated February 28, 1979, and received March 1, 1979, the agency provided appellants with general reduction-in-force notices (5 C.F.R. § 351.803) which advised them that due to a reorganization of the unit in which they were employed their positions would be abolished. The notices further advised appellants that the agency did "not know yet what all of the individual personnel actions will be," but that at such time as their assignment rights could be determined they would be notified "at least 5 days before the effective date."

By memoranda dated April 2, received April 3, 1979, the agency informed appellants that it was unable to offer them other positions, making necessary their separations by reduction in force effective April 7, 1979. The actions were subsequently accomplished as scheduled, and each appellant submitted his retirement from the Federal service as of that same date.

Review of the materials submitted by the parties establishes that the agency's decision to abolish appellant's positions and reorganize the unit in which they were employed was the consequence of a determination to "contract out" the janitorial and

grounds maintenance functions as well as to reduce, to a minimal level, other industrial-commercial activities not directly a part of the agricultural research program. Appellants dispute the agency's conclusion that a cost savings would result to the Government by eliminating such inhouse services and securing them on contract and purchase order bases. They also assert that since the same or similar duties are now being carried out by private sector personnel, the reduction in force was violative of 5 C.F.R. § 351.201 since it was not occasioned by a legitimate lack of work, lack of funds, or reorganization.

Whether or not any contract between a Government agency and a private firm is improper because it has resulted in the procurement of personal services in violation of Federal personnel laws is irrelevant to, and therefore not for decision in, a reduction-in-force appeal. Even if such a contract is found to be improper, this does not make the employees of the private firm Federal employees and thus "competing employees" under the law and the Civil Service regulations pertaining to reduction in force (5 U.S.C. 3502, 5 C.F.R. 351.203(c)). Since employees of the private firm can not be "competing employees," a Federal employee has no right to displace or "bump" an employee of the private firm; in similar manner, an employee of the private firm has not right to displace or "bump" a Federal employee when reductions in force occur in the private firm. In any case, if the contract between the agency and the private firm were found to be improper, the agency would have the opportunity of correcting the impropriety. This correction could take the form of terminating the contract, or requiring that the services under the contract be performed properly in the future. If the contract were terminated, this does not necessarily mean that the agency would have the services performed by Federal employees, and even if the agency decided to do so, the vacancies created by this decision would not be required to be filled by employees affected by the reduction in force. For these reasons, there is no basis for acting on the issue of the propriety of contracting out by the government agency in connection with a reduction-in-force appeal. (United States Civil Service Commission Appeals Review Board Decision Number RB035150169, February 20, 1975.)

Although "contracting out" is not an issue reviewable by the Board, should appellants wish to make a specific allegation concerning the propriety of the agency's personal services contract(s), they may present their information directly to the Office of Personnel Management.

Appellants further contend that the agency's decision to reorganize "violates the Government's (1) health and safety requirements and (2) labor relations obligations." Neither of these matters are among those for which responsibility has been assigned to the Board (5 U.S.C. § 1205(a.) They thus are not subject to con-

sideration in the adjudication of appeals from reduction-in-force actions. Similarly, appellant Souza's assertion (Hearing Transcript, p. 183) that the position from which he was separated should have been classified at a higher grade is not reviewable in this forum.

Finally, appellants assert that the agency did not furnish them with specific notices in "sufficient time prior to effective date." 5 C.F.R. § 351.803 provides in pertinent part that when, as in the instant cases, "... a general notice is supplemented by a specific notice an agency may not release an employee from his competitive level until at least 5 days after the employee's receipt of the specific notice." As set forth above, appellants received the agency's specific notices on April 3, 1979. Thus, to insure compliance with 5 C.F.R. § 351.803, their separations could not be accomplished prior to April 8, 1979. As is also set forth above, the agency in fact effected the actions on April 7, 1979.

Under 5 U.S.C. § 7701(c)(2), the agency actions may not be sustained if appellants demonstrate "harmful error" in the application of relevant procedures. It is apparent that appellants were not provided the minimal notice mandated by regulation. It is equally apparent that this error was not "harmful" in that absent the impropriety appellants still would have been separated. I therefore do not find that reversal of the actions is appropriate.

No other issues have been raised in support of the appeals.

INITIAL DECISION

The actions of the agency in separating appellants are affirmed. However, the agency is directed to amend its records to reflect the separations as having been accomplished as of April 8, 1979.

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on September 24, 1979 unless a petition for review is filed with the Board within 35 calendar days of issuance of this decision.

Any party to this appeal, the Director of the Office of Personnel Management, and the Special Counsel may file a petition for review of this initial decision with the Merit Systems Protection Board. The petition shall set forth objections to this decision, supported by references to applicable laws or regulations, and with specific reference to the record.

The petition for review must be filed with the Secretary to the Merit Systems Protection Board, 1717 H Street, N.W., Washington, D.C. 20419.

The Board may grant a petition for review when a party submits written argument and supporting documentation which tends to show that:

(1) New and material evidence is available that despite due diligence was not available when the record was closed; or

(2) The decision of the Presiding Official is based upon an erroneous interpretation of statute or regulation.

The Director of OPM may file a request for review only if he/she is of the opinion that the decision is erroneous and will have substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office (5 U.S.C. 7701(e)(2).

Under 5 U.S.C. 7703(b))1), the appellant may petition the United States Court of Appeals for the appropriate circuit or the United States Court of Claims to review any final decision of the Board, provided the petition is filed no more than thirty (30) calendar days after receipt.

For the Board:

GREGORY V. MORROW, JR.,
Presiding Official.