UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

EARL M. MATTHEWS	)	
	)	
v.	)	DOCKET NUMBER
	)	CH0351821/0102
ENVIRONMENTAL PROTECTION AGENCY	)	
	)	

OPINION AND ORDER

Earl M. Matthews (appellant) was separated by the Environmental Protection Agency (agency) from his position as an Emission Test Worker, WG-5801-8, at an agency facility in Ann Arbor, Michigan. The separation was effective October 19, 1981, pursuant to a reduction in force (RIF).

Appellant appealed the action to the Board's Chicago Regional Office, and in an initial decision dated March 29, 1982, a presiding official from that office found that the agency had properly invoked the RIF regulations, and had properly applied them to appellant. Therefore, the presiding official affirmed the agency's action.

Appellant has petitioned for review, arguing that the presiding official erred in his interpretation and application of laws and regulations, and that the presiding official also erred in his procedural handling of the case. Appellant contends that the presiding official allowed the agency to make untimely filings with the Board throughout the appeal process, and that this has resulted in unequal application of the Board's rules and applicable laws.[1] In

---

[1] The record indicates that a Board Order acknowledging receipt of the appeal and ordering a response from the agency and designation of representative within 15 days of the agency's receipt of the Order was erroneously addressed to an incorrect office of the agency. See 5 C.F.R. § 1201.22(b). While the Order eventually reached the proper office, the record indicates that a Board employee further complicated matters by misinforming the agency in a telephone call of the due date for a response. See Note For File by Board employee Betty Caplis, dated November 24, 1981.

addition, appellant claims that agency and Board employees engaged in prohibited ex parte communications.

We have carefully reviewed the record in this case, and we find that the agency has not received any unfair advantage in the application of the Board's regulations. While the agency was allowed more than 15 days to file its response to the appeal, the extension was quite minimal, and appellant fails to show that he was prejudiced by the short delay. The imposition of sanctions is a matter generally left to the sound discretion of the presiding official. 5 C.F.R. § 1201.43. We find no abuse of that discretion for the reasons discussed in the initial decision.

Furthermore, appellant fails to establish that any prohibited ex parte communications took place concerning the merits of the appeal. Therefore, he has not shown reversible error in this regard. See Ragland v. Internal Revenue Service, 6 MSPB 565 (1981).

Appellant also claims he was prejudiced by the time and location of the hearing, in that, inter alia, he was effectively prevented from presenting certain witnesses in his behalf. However, the record indicates that the presiding official presented appellant an opportunity to postpone the hearing. Appellant chose not to take advantage of this opportunity, and thus fails to show that he was unfairly prejudiced.2/ See the presiding official's memo at Tab 9.

Appellant further argues that the presiding official was biased in favor of the agency in his handling of the case. Appellant's allegation fails to overcome the presumption of honesty and integrity which accompanies administrative adjudicators. Oliver v. Department of Transportation, 1 MSPB 368, 370 (1980). In addition, appellant failed to request the presiding official's disqualification at the hearing. See Initial Decision (I.D.) at 4-5; 5 C.F.R. § 1201.42(b).

2/ Due to Board budgetary constraints in early 1982, all hearings were held at the Board's Regional Office.

Relying on the provisions of 5 U.S.C. § 3403, appellant argues that the agency improperly abolished his permanent full-time position in order to establish a permanent part-time position.3/ However, as found by the presiding official, the agency established that its actions were motivated by a legitimate management consideration, as specified in 5 C.F.R. § 351.201(a). The RIF was undertaken due to a decreased allocation for full time positions. See I.D. at 7. In order to lessen the impact of the RIF, the agency offered a number of employees permanent part-time positions, which it is permitted to do. See 5 C.F.R. § 351.704(b)(4). The abolishment of appellant's position was not prompted by an intent to make the duties of appellant's position available to a part-time employee, and thus 5 U.S.C. § 3403 was not violated.

Appellant next contends that the retention register used by the agency in effecting the RIF was incorrect and that employees were listed in incorrect order. In making this argument, appellant has presented insufficient evidence to overturn the finding in the initial decision that the retention lists were properly prepared. Weaver v. Department of the Navy, 2 MSPB 297, 299-300 (1980). Similarly, appellant has failed to show that the presiding official erred in determining that appellant's competitive

---

3/ Appellant cited 5 U.S.C. § 3403 in his argument before the presiding official. While not specifically citing this statutory provision in his petition for review, appellant's arguments in his petition reassert the claimed violation.

5 U.S.C. § 3403 is a section of the Federal Employees Part-Time Career Employment Act of 1978. It prohibits an agency from abolishing any position occupied by an employee in order to make the duties of such position available to be performed on a part-time career employment basis. See 5 U.S.C. § 3403(a).

level was properly drawn to exclude GS-9 Mechanical Engineering Technician positions. The provisions of 5 C.F.R. § 351.403(b)(1)(i) require that each agency shall establish separate competitive levels for positions that are under different pay schedules.

Finally, appellant argues that he had a right to be assigned to a GS-9 Mechanical Engineering Technician position on the basis of his asserted "retreat" rights.[3] Under 5 C.F.R. § 351.703(a)(2), an employee who is subject to RIF procedures may retreat to a position which is filled by an individual with lower retention standing if he was promoted from that position or an essentially identical position. Appellant has not established that any GS-9 Mechanical Engineers in his competitive area were in a lower subgroup. However, he claimed that when he was promoted from a WG-7 position to a WG-8 Emission Test Worker position, he was promoted through the GS-9 Mechanical Engineering Technician position.[4] Although we agree that the WG-8 and GS-9 positions are similar, as noted by the presiding official, evidence indicates that the GS-9 position is a higher level position than the WG-8, and included additional responsibilities and duties.[5] Therefore, we find appellant fails to establish that he was promoted

---

[4] Being promoted "from" a position encompasses promotions "from or through" a position. Gallegos v. Department of Defense, MSPB Docket No. DE03518110071 (February 11, 1982).

[5] For example, the job description for the GS-9 position specifically notes that an incumbent must have advanced "beyond the normal Emission Testing Worker level." (Emphasis added). In addition, the GS-9 must coordinate the work of others and is responsible for the results of the work assigned, responsibilities not apparent in the WG-8 job.

"through" the GS-9 position when he was promoted from a WG-7 position to a WG-8 position. Thus, we need not address appellant's assertion that at the time he received his RIF notice, the representative rate for the GS-9 position was lower than that of the WG-8 job.

Accordingly, having fully considered appellant's petition for review, and finding that it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, the Board hereby DENIES the petition.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113(b).

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review 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:

JAN 4 1994
(Date)

Washington, D.C.

Robert E. Taylor
Secretary