ROGER PEELE
v.
DEPARTMENT OF HEALTH AND HUMAN SERVICES

Docket No.
DC075299071

OPINION AND ORDER

Appellant, a physician, appealed from his reassignment from Assistant Superintendent, GS-17, Saint Elizabeth's Hospital, Washington, D.C., a position in the competitive service, to the position of Assistant Director for Treatment at the National Institute of Mental Health, an unclassified position pursuant to 5 U.S.C. 3104. In the initial decision, the presiding official noted that appellant was being paid the same salary as before his reassignment and determined that the resassignment from a classified position to an unclassified position did not constitute a reduction in grade or pay. Indeed, in light of the agency's representation that appellant's position remains in the competitive service, the presiding official found that the appellant's appeal was not based on an actual loss of grade or pay but on a potential loss of benefits. Thus, the presiding official decided that appellant's appeal was not within the Board's jurisdiction.

Since the Board's appellate jurisdiction to adjudicate issues of discrimination or reprisal is limited to cases where such issues are alleged as the basis for actions which are appealable to the Board, the presiding official similarly rejected appellant's contention that the reassignment was in reprisal for his complaint of discrimination. 5 U.S.C. 7702(a)(1).

As the basis for appellant's petition for review, he alleged that the presiding official erred in his interpretation of the controlling statute, 5 U.S.C. 7511(a)(3) and (4)[1] and relevant case law. Appellant, by his attorney, argued that the agency should have afforded him notice and the opportunity to answer the reassignment action as specified under 5 U.S.C. 7513.

In support of this argument, appellant stated that his reassignment under 5 U.S.C. 3104 subjects him to the pay provisions of 5 U.S.C. 5371, which could effectively reduce his grade and pay. Under 5 U.S.C. 5371, ". . . the head of the agency concerned shall fix the annual rate of pay for scientific and professional positions established under section 3104 of this title, at not less than the minimum rate for GS-16 nor more than the maximum rate for GS-18." Appellant alleged that since he could

[1] 5 U.S.C. 7511(a)(3) states, "'grade' means a level of classification under a position classification system."

5 U.S.C. 7511(a)(4) states, "'pay' means the rate of basic pay fixed by law *or administrative action* for the position held by an employee." (emphasis supplied).

be compensated as a GS-16, the reassignment is a reduction in grade. In addition, appellant urged that in order to fall within the purview of the Board's jurisdiction, the law requires only a reduction in the rate of basic pay fixed by law and not an actual loss of pay.

Appellant also complained that, due to his reassignment, he no longer has the benefits of a graded system such as periodic step increases and he is precluded from joining the Senior Executive Service under 5 U.S.C. 5382. He contended that any benefits of pay or awards under the Senior Executive Service are now foreclosed to him.

Finally, the appellant argued in his petition that even if a reducton in grade or pay is a mere potentiality, the agency head, by statute, could facilitate such a reduction or fail to increase his salary in accordance with the increases payable to employees classified at GS-17. In such event, appellant's right to appeal would be time barred. In support of this argument, appellant cited the cases of certain employees of the National Aeronautics and Space Administration (hereinafter "NASA") that were decided by the former Federal Employees Appeals Authority and sustained by the Office of Appeals Review.[2] Appellant claimed that the holding of these cases dictated that the right to appeal an adverse action occurs at the time the agency action, e.g., reassignment, places the employee in a posture where his pay could be reduced or not increased in accordance with the General Schedule. Appellant claimed that his situation places him in a catch-22 position and that, therefore, the agency action was arbitrary and capricious and violative of 5 U.S.C. 7513, which grants defined employees appeal rights. In connection with this argument, appellant maintained that due process of law mandates that he has a right to appeal since a Federal employee has a property interest in his employment, grade level and salary, and the benefits flowing from the employment relationship.

The agency's response to the petition relied on the record and the decision of the presiding official.

Upon examination of appellant's petition, the Board finds that it has not met any of the criteria for review by the Board as set forth in 5 C.F.R. 1201.115. Appellant's argument that the presiding official misinterpreted relevant statutory law and case law is erroneous.

It is clear that the appellant was not reduced in "grade," as defined at 5 U.S.C. 7511(a)(3), *supra*, since he is no longer under a position classification system. Further, appellant has not disputed the agency's

[2]See *Glahn v. NASA*, FEAA Decision DC752B8008 (October 19, 1977); *Lehmann v. NASA*, FEAA Decision DC752B8009 (October 19, 1977). The FEAA, part of the Civil Service Commission, was the predecessor organization to the Board's Field Offices. The action taken by the Office of Appeals Review, then an organization within the Board, was taken in accordance with the law in effect prior to January 11, 1979. Both cases involved employees reassigned from the competitive to the excepted service who attempted to appeal a later raise in pay based on their contention that, had they remained in the competitive service, their raise would have been bigger.

letter dated February 7, 1979 to the Office of Personnel Management, in which it stated that appellant's reassignment ". . . is commensurate in scope and responsibility to grades GS-16 through GS-18."

Appellant's argument that he has suffered a reduction in pay is similarly specious. Since the position to which appellant was reassigned still compensates him as a GS-17, it is obvious that his pay has not been reduced. Appellant's contention that a reduction in pay does not have to connote an actual loss since pay is defined by 5 U.S.C. 7511(a)(4) as the rate of basic pay fixed by law overlooks the subsequent words of that statute. 5 U.S.C. 7511(a)(4) states that "'pay' means the rate of basic pay fixed by law *or administrative action* for the position held by an employee." (emphasis supplied.) Thus, appellant's current pay, fixed by administrative action at the same rate as before his reassignment, which rate had been limited by law, precluded a finding that his pay has been reduced. Similarly, appellant's complaint that his reassignment deprives him of the possible future benefit of periodic step increases must fail.

Appellant's assertion that his new position does not qualify for the Senior Executive Service (SES) does not require the granting of appellant's petition.[3] Entry into the SES is not an absolute right of federal employees. Rather, agencies, under the guidance of the Office of Personnel Management, are the designators of these postitions. 5 U.S.C. 3133, 5 C.F.R. 317.101. It is noteworthy that the appellant has not alleged that his position prior to his reassignment qualified for or was placed in the Senior Executive Service, so it is difficult to see the relevance of this argument.[4]

We find nothing in appellant's reference to the two cases decided by the FEAA which would render the instant action appealable. The said cases, which do not decide the issue of whether a timely appeal from the reassignment action would have been acceptable for adjudication, were decided by a different authority than this Board and do not in any way bind the Board. Further, the disposition of the cases was based on statutes that have no applicability to appellant's case; nor was the ap-

[3]The Board notes that appellant has not contradicted the agency's contention that, while he is not eligible for SES bonuses of periodic step increases, he may be eligible for a bonus under the Federal Physicians Comparability Allowance Act of 1978, additional pay increases upon recommendation of the Assistant Secretary for Health, and "the executive development, sabbatical consideration, and other incentive awards that have always been available to executive personnel." (Agency letter of July 16, 1979 at 3-4).

[4]While an aggrieved employee may appeal to the Board from actions concerning conversions to the SES (*See* section 413(j) of the Civil Service Reform Act of 1978, P.L. 95-454, 92 Stat. 1177), the decision of an agency not to convert a position is not an adverse action under 5 U.S.C. 7512. Further, the agency has stated, without refutation by appellant, that appellant was informed of the right to appeal the designation of his new position as non-SES, but did not do so. (See agency letter of July 16, 1979 at 4).

pellant here reassigned from a position in the competitive service to one in the excepted service, as were the employees in the other cases.[5]

Thus, because he retains competitive status, the appellant retains all rights associated with a competitive appointment including the right to appeal adverse actions, if and when they occur, in accordance with 5 U.S.C. 7512 and 7513. As found above, however, appellant's reassignment is not such as action. Any future determination which results in a reduction in pay when compared with the rate of pay payable for appellant's former GS position would not be appealable under the reasoning of the two FEAA cases he cites and we have not been directed to any other authority which would render such a determination appealable. *See United States v. Testan*, 424 U.S. 392 at 402 (1976), where the Court held that an employee is only entitled to the benefits of the position to which he has been duly appointed.

The Board concludes that this appeal is outside its jurisdiction[6] since a reassignment is not itself an "action" which is appealable to the Board. *Crary v. Federal Aviation Administration*, 1 MSPB 438 (1980); *Lund v. Department of State*, 1 MSPB 468 (1980); *Lange v. Department of Transportation*, 2 MSPB 110 (1980). The change, which may result in benefit to the appellant, has not been shown to be an adverse action.

Accordingly, appellant's petition for review is DENIED. This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

WASHINGTON, D.C., *May 20, 1981*

[5]In accordance with 5 C.F.R. 335.101(a) a position change authorized by 5 C.F.R. 335.102 (i.e., agency action of reassignment) does not change the competitive status of an employee. FPM ch. 212, subch. 3-6(b) states, "Ordinarily, documents in the person's Official Personnel Folder will show whether he has competitive status or eligibility therefor. Sometimes agency records contain proof of competitive status or the person may have evidence of competitive status such as the employee copy of Standard Form 50, 'Notification of Personnel Action.'" In appellant's case, the SF-50 pertaining to his reassignment specifically shows him to be in the competitive service. Further, positions established and filled under 42 U.S.C. 210(g) and 5 U.S.C. 3325, although not filled through competitive examination, are in the competitive, or "classified" civil service.

[6]While it would appear that the Office of Personnel Management (OPM) has authority with respect to the movement of employees between the civil service system and other merit systems (*see* Civil Service Rule 6.7), OPM has not rendered such a reassignment an appealable action. *See* 5 U.S.C. 1103; 5 U.S.C. 1205(a)(1); 5 U.S.C. 7701(a); 5 C.F.R. 1201.3(a)(8).