UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

MANMOHAN SAHNI
v.
GOVERNMENT OF THE DISTRICT OF COLUMBIA

Docket No.
DC035109029

OPINION AND ORDER

Appellant was separated from his position as an Economist with the D.C. Department of Labor by reduction-in-force (RIF) procedures. The presiding official of the Board's Washington, D.C. Field Office affirmed the agency's action, and appellant petitioned for review. Appellant's petition is GRANTED.

I. BACKGROUND

Appellant's position was in the excepted service, and was partially funded by the U.S. Department of Labor pursuant to an Occupational Safety and Health Program Grant. The agency requested termination of the grant for fiscal year 1980, and applied RIF procedures to appellant's position because of the consequent lack of funds.

Appellant alleged that the RIF had been improperly motivated and taken for reasons personal to him. He also alleged that required procedures had not been followed.

The record shows that appellant had criticized the agency and his supervisor, Mr. Greene, to various D.C. Government officials, and that Mr. Greene was aware of appellant's activities. *See* the agency's response to the appeal, written by Mr. Greene, *infra.* The presiding official dismissed the allegation that the RIF had been taken in reprisal for these activities, because appellant had "submitted no evidence to show that his allegations were ever found meritorious by any of the officials who heard his complaints."

In addition, the presiding official stated that since appellant's rights on appeal concerned procedural matters, appellant had the burden of showing harmful error in the application of the procedures, citing 5 U.S.C. 7701(c)(2) and 5 C.F.R. 1201.56.

II. DISCUSSION

The Board finds the reasoning of the initial decision to be erroneous both in interpreting the pertinent RIF regulation and

in allocating the burden of proof. The initial decision is inconsistent with our later decision, *Losure v. ICC*, 2 MSPB 361 (1980), in which we addressed the issue of the proper allocation of the burden of proof in RIF cases. Accordingly, the Board will reconsider this case in light of our decision in *Losure*.

Reduction-in-force actions are governed by Chapter 35 of Title 5, U.S. Code. The circumstances under which a RIF may be justified are set out at 5 C.F.R. 351.201(a): "lack of work, shortage of funds, reorganization, reclassification due to change in duties, or the exercise of reemployment rights or restoration rights." The agency presented a *prima facie* showing that it conducted a RIF for a legitimate management reason, *i.e.*, shortage of funds. However, the Board will not allow the circumvention of adverse action procedures where the agency's stated reason is in reality a pretext for summary removal. *Losure, id.; Fitzgerald v. Hampton*, 467 F.2d 755 (D.C. Cir. 1972).

As we stated in *Losure, supra*, 366:

> If the employee presents no rebuttal evidence to challenge the *bona fides* of the agency's alleged reason for the RIF, the agency's initial evidence would normally suffice to meet also the agency's burden of persuasion on this element of its decision. Once the agency makes out a *prima facie* case, the burden of going forward with rebuttal evidence shifts to the employee but the burden of persuasion (more precisely the risk of non-persuasion) never shifts from the agency. Thus, where credible evidence, either in the employee's rebuttal presentation or in the agency's own admissions, is sufficient to cast doubt on the *bona fides* of the RIF, the agency may find it advisable to present additional evidence to meet its burden of persuasion. But whether the agency presents such additional evidence or not, the burden remains on the agency to persuade the Board by a preponderance of the evidence that the RIF regulations were in fact invoked for one of the legitimate management reasons specified in 5 C.F.R. 351.201(a).

In this case we find that there is sufficient credible evidence, in appellant's rebuttal and in the agency's own admissions, to cast doubt on the *bona fides* of the decision to invoke RIF procedures, as well as on the manner in which that action was taken.

Appellant alleged, and the record demonstrates, that there was animosity between him and Mr. Greene. (*See* Appellant's Exhibit 1). Appellant conducted an informal, on-going grievance, mainly against Mr. Greene, which he took before various D.C. government officials. By August, 1979, his complaints had reached Mayor Marion Barry. The record demonstrates that Mr. Greene was

aware of this fact. When he (Greene) wrote the agency's response to appellant's appeal, he stated:

> (i)t should be noted that Mr. Sahni has had ample opportunity to voice his allegations of lack of proper management, gross and chronic under-utilization of existing manpower resources, mismatch of job duties and available skills, the illegal interference with the performance of an independent program, the shielding overall incompetence and inefficiency. Mr. Sahni has had the freedom, with my full knowledge and permission to talk to the members of the D.C. Minimum Wage and Industrial Safety Board, the Acting Directors of the D.C. Department of Labor, and to Mayor Marion Barry. This he has done without any further action being taken or recommendations being made by these responsible officials with whom he had the opportunity to voice his complaints.

Mr. Greene's letter withdrawing the agency from the Grant Program for fiscal year 1980, and appellant's Notice of Separation, were dated August, 1979, as was a letter from appellant to Mayor Barry criticizing Mr. Greene and requesting reassignment. Appellant also alluded to an adverse evaluation of him written by Mr. Greene. (H.T. at 65). The record of animosity between appellant and Mr. Greene, considered in conjunction with other circumstances in this case, raises at least an inference that appellant's separation by RIF procedures was for reasons personal to him, and thus improper. *See Losure, supra.*

Appellant alleged that he should have been assigned to a vacant position rather than separated. He produced evidence of vacancies, had applied for one position before being separated, and was carried on the competitive senior level register; however, concerning the agency's reason for not assigning him, one agency witness testified:

> based on the information that we had here, as far as your citizenship was concerned, for positions in the competitive service, you would not have been eligible, because for competitive service positions you do have to be a United States citizen. (H.T. at 21).

In fact appellant, who had been born in India, was a United States citizen. He had twice so informed the agency; once by letter in 1976, the year he was naturalized, and again in May, 1979 when he responded to the agency's order for up-dated SF-171's. (*See* H.T. at 16-17). The agency witness explained:

> yes, I am aware of the 171's that were reworked. All employees were required to update their 171's and submit it to Personnel. However, they were not found in official personnel

folders, because at the time they were used for different, you know, reporting purposes, so there was a special purpose for those, and they have not, to this day, gone into the folders. (H.T. at 16).

For that reason, the agency consulted appellant's 1971 SF-171 form, rather than his up-dated one, in order to determine his eligibility for positions within the agency. Consequently, in the Notice of Separation the agency stated, "(w)e have not been able to identify a vacancy for which you qualify." Because of this error, the agency has failed to show that it made a proper determination of appellant's entitlement under the RIF regulations. *See Losure,* 365, n. 5, which places the burden of proof in this respect on the agency.

Although the above testimony indicates that *no* employee's up-dated SF-171 form was consulted prior to the RIF, and although the initial indication was that one other employee was also affected (H.T. at 8), we note that appellant stated that he was the only one out of the program who was out of a job. (H.T. at 65). The agency has not stated that any other employee was removed or demoted pursuant to the RIF. Accordingly, the agency's error, while it was applied evenly, had a deleterious effect only on the appellant.

In short, although the agency knew that it had ordered up-dated SF-171 forms just three months previous to appellant's RIF, it chose to ignore his up-dated form for what we find to be a flimsy reason, at best. This casual attitude toward appellant's official records, considered along with the evidence of animosity between appellant and Mr. Greene, tends to demonstrate that appellant's separation was the agency's actual goal. However, the error is so serious that the agency's actual motivation in the matter is not of controlling importance.

The agency's failure to maintain current records also violates the spirit of the RIF regulations; 5 C.F.R. 351.505 provides, *inter alia,* that in RIF actions,

> (e)ach agency shall maintain the current, correct records needed to determine the retention standing of its competing employees.

This requirement is spelled out in greater detail in FPM Chapter 351-A-1 (November 20, 1964; revised July, 1969):

A-1-a. provides, *inter alia,*

> (a)n agency must maintain at all times the records necessary to determine the retention standing of its competing employees.

A-1-b. provides, in pertinent part, that

(t)he basic information needed to determine retention preference in a reduction in force is described below. . . . The agency must make any determinations necessary to establish these records.

A-1-b. (8) concerns the employee's competitive status and provides,

(t)he record must show whether the employee has competitive status. If so, it should show how it was obtained. It also should show whether the employee is serving with a competitive status. This information is needed to validate the nature of current employment and to determine rights of employees serving in excepted positions to participate in the Displaced Employee Program.

In this regard, we note that the presiding official asked the agency's witness on matters of procedure whether the D.C. government had its own provisions for assignment rights of excepted service employees. The witness responded that excepted service employees were not entitled to priority placement (H.T. at 22). Appellant, who appeared *pro se* at the hearing, did not then rebut that testimony. However, the accuracy of that response has now been placed into question by appellant's petition for review, to which the agency has not responded.

Specifically, appellant's newly retained counsel points out that:

(t)he D.C. Government's regulations governing reductions-in-force are found at DPM-20. Section B of these regulations defines the District's Displaced Employee Program, which specifies that

"a. It is the policy of the District Government to utilize vacancies to the extent possible in minimizing the adverse impact of a reduction in force on employees. . . . The placement of employees under this program *is required* whenever a suitable vacancy exists, there is no restriction on filling the position, and the employee is qualified." (Emphasis added.)

The program is to be applied without regard to competitive area, if necessary (Section b), and "applies to all departments, agencies and organizational components under the administrative jurisdiction of the Mayor. Department heads . . . *are required* to establish and administer a displaced employee program in their respective departments in accordance with these guidelines" (Section c). (Emphasis added).

Absent rebuttal by the agency, we find that it has failed to show that its action was proper in these respects.

III. CONCLUSION

We conclude that although the agency showed, *prima facie,* that it had taken the RIF action for a reason permitted by regulation, the *bona fide* nature of its decision has been rebutted by a strong inference that the agency's motivation was actually personal to appellant. Even without that inference, the action must fail because the agency, for whatever reason, failed to keep *and consult* the records which the RIF regulations require, and which determine appellant's entitlement to continued employment. Accordingly, the agency has failed to carry its burden of proving, by a preponderance of the evidence, that the RIF regulations were in fact properly invoked for one of the legitimate management reasons specified in 5 C.F.R. 351.201(a). *See Losure, supra.*

Accordingly, its is ordered that:

1. The initial decision dated January 16, 1980 is reversed;
2. The District of Columbia Department of Labor is directed to cancel the personnel action separating Manmohan Sahni;
3. Within ten (10) days of the date hereof, the D.C. Department of Labor shall file with the Board's Washington, D.C. Field Office written verification of its compliance with paragraph (2) of this Order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *November 21, 1980*