

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

BELINDA A. TUGGLE)	
)	
v.)	DOCKET NUMBER
)	DC03518210356
CONSUMER PRODUCT SAFETY)	
COMMISSION)	

OPINION AND ORDER

The appellant, a competitive service employee of the Consumer Product Safety Commission (agency), was separated from her position as a Secretary, GS-7, through reduction in force (RIF) procedures effective November 13, 1981. Appellant filed a timely appeal of the agency action with the Board's Washington Regional Office .

Appellant contended that the composition of the competitive area established pursuant to 5 C.F.R. §351.402 improperly denied her the right to compete with any other employees. The competitive area included one of the agency's Commissioners (a Schedule C appointee) and four individuals who served on his staff: two excepted service GS-15 Attorney Advisors, one excepted service GS-11 Staff Assistant, and the appellant.^{1/} Therefore, appellant was the only member of the competitive area with competitive service status.

In the initial decision, the presiding official reversed the agency's action, and cancelled the separation. Relying

^{1/} The agency established six competitive areas in its Washington Metropolitan area. The immediate office of the Chairman was one competitive area, the four immediate offices of each of the other four Commissioners were separate competitive areas, and all other agency organizations in the Washington area were combined into one competitive area.

on the provisions of Chapter 351 of the Federal Personnel Manual, (FPM) Subchapter 2-2,^{2/} the presiding official found that the "record fails to establish that the agency has met its burden of proof to show that its competitive area designation provided adequate competition for the appellant." Initial Decision at 4. This resulted in appellant having "no more rights than a Schedule C employee would have had," and therefore the action could not be upheld. Id.

In its petition for review, the agency contends that the initial decision is based on erroneous interpretation of statute and regulation. The agency cites 15 U.S.C. § 2053(f)(1) as establishing that each of the offices of the agency's Commissioners is under a separate administrative authority.^{3/} Therefore, according to the agency, the appellant's competitive area was properly designated, for it was under a single administrative authority which was created in order to ensure that each Commissioner would be able to control the staffing of his or her immediate office.

2/ FPM Chapter 351, Subchapter 2-2 provides, in part:

Each agency establishes competitive areas within which employees compete for retention under the reduction-in-force regulations. The standard for a competitive area is that it include all or that part of an agency in which employees are under a single administrative authority. . . . The competitive area should be large enough to permit adequate competition among employees and limited enough to be administratively manageable.

3/ 15 U.S.C. § 2053(f)(1) provides:

The Chairman of the Commission shall be the principal executive officer of the Commission, and he shall exercise all of the executive and administrative functions of the Commission with respect to (A) the appointment and supervision of personnel employed under the Commission (other than personnel employed regularly and full time in the immediate offices of Commissioners other than the Chairman),

In addition, the agency challenges the presiding official's finding that appellant was not provided with adequate competition, in that it substitutes a requirement of actual competition for the FPM's guideline of adequate competition. Appellant has filed an opposition to the petition for review.

The petition for review is GRANTED.

The governing regulation states "The standard for a competitive area is that it include all or that part of an agency in which employees are assigned under a single administrative authority." 5 C.F.R. § 351.402(b). In the instant case, each Commissioner of the agency was empowered by statute to exercise administrative authority in the appointment and supervision of the personnel on his or her immediate staff. See footnote 3, supra. As noted by the agency, the vesting of this authority in each Commissioner allows an independence which is important to the functioning of the agency. Thus, we find that, contrary to the finding of the presiding official, the statutorily established administrative authority granted to each Commissioner indicates that employees should not, through application of RIF regulations, be able to "bump" into a position on a Commissioner's immediate staff.^{4/}

^{4/} This argument was raised by the agency before the presiding official. The agency has argued throughout these proceedings that Commissioners should be able to select and retain persons who are compatible with their respective policies and plans. Contrary to appellant's assertion that the "confidential" nature of the relationship between a Commissioner and his or her immediate staff is being raised for the first time, the agency maintained this same position before the presiding official.

The presiding official relied on FPM Chapter 351, subchapter 2-2, which provides that competitive areas should allow for adequate competition for employees. The FPM, insofar as it includes more than a restatement of statutory and regulatory requirements, constitutes only the Office of Personnel Management's official "guidance" to agencies. See Carter v. Department of the Navy, 6 MSPB 92 (1981). Thus, the primary standard for examining the validity of the designation of a competitive area for a RIF is whether the "single administrative authority" requirement of 5 C.F.R. § 351.402(b) has been met. The designation of each Commissioner's office as a competitive area meets this standard.

Therefore, we find that the agency has established by a preponderance of the evidence that appellant's competitive area reflected a statutorily established administrative scheme and conformed to the applicable regulations. See Wilmot v. United States, 205 Ct. Cl. 666 (1974); Losure v. Interstate Commerce Commission, 2 MSPB 361 (1980).^{5/}

Accordingly, the initial decision is REVERSED, and the agency action separating appellant from her GS-7 Secretary position is SUSTAINED.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

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.,

^{5/} Inasmuch as we find that appellant had no right to further competition, we need not address her contention that adequate retention registers were not made available to her for review.

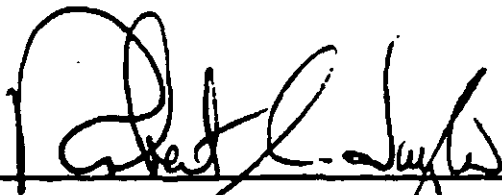
Washington, D.C. 20439. The petition for judicial review must be filed no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

MAR 19 1984

(Date)

Washington, D.C.



Robert E. Taylor
Secretary