

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

DIANE Y. WASHINGTON,  
Appellant,

v.

DEPARTMENT OF THE NAVY,  
Agency.

DOCKET NUMBER  
SF03308910310

DATE: MAR 27 1990

Diane Y. Washington, Spring Valley, California, pro se.<sup>1</sup>  
Steven E. Sommers, San Diego, California, for the agency.

BEFORE

Daniel R. Levinson, Chairman  
Maria L. Johnson, Vice Chairman

OPINION AND ORDER

This case is before the Board pursuant to the appellant's timely petition for review of the June 5, 1989, initial decision which found that the agency did not violate her reemployment rights by its failure to consider her for a GS-11 position for which she qualified on a reemployment priority

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<sup>1</sup> The appellant was represented by an attorney in her appeal below, but filed her petition for review pro se. As a courtesy, her attorney of record is being furnished a copy of this decision. In addition, appellant alleged racial discrimination below, and did not prevail on that issue. She did not seek review of it in the petition for review, and we have therefore not addressed it.

list (RPL). The agency has responded to the petition for review. The appellant's petition for review is DENIED because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. The Board REOPENS this case on its own motion under 5 C.F.R. § 1201.117, however, and AFFIRMS the initial decision as MODIFIED by this Opinion and Order.

#### BACKGROUND

The appellant was separated from the position of Public Affairs Specialist, GS-1035-9, pursuant to a RIF action, effective July 1, 1988. As required by 5 C.F.R. § 351.1002, she was registered on an RPL. She was registered as qualified, and entitled for consideration, at the GS-9 and GS-11 levels. The facts in this case are undisputed. In this instance the agency, in June 1988, announced a vacancy for a Supervisory Public Affairs Specialist position, at the GS-11/12 level. The agency has admitted throughout this appeal that it did not consider appellant for this position. Rather, it filled the position on January 1, 1989, at the GS-12 level, via the lateral transfer of an employee from the Department of the Army.

#### ANALYSIS

In affirming the agency's admitted non-consideration of the appellant for the position in question, the administrative judge held that RPL rights are to be administered in a manner similar to RIF rights, citing Federal Personnel Manual (FPM) Chapter 330, Subchapter 2. The administrative judge then concluded that the appellant was not entitled to consideration

at a level higher than that of her former GS-9 position. In so holding, the administrative judge acknowledged that this view had not been presented by the agency in the appeal. Indeed, the agency concedes in its response to the petition for review that the appellant may have a valid argument in her assertion that the administrative judge erred in her *sua sponte* holding.

Specifically, the agency points to provisions of the FPM and to Office of Personnel Management (OPM) comments on the then-proposed changes to RPL regulations.<sup>2</sup> The agency notes that:<sup>3</sup>

(1) Under FPM Chapter 330, Subchapter 2, "[e]ach of these employees who has not declined assignment to a full-time, nontemporary, competitive position at a representative rate equal to or above that held when separated is to be listed for all positions for which he is qualified and available." (Emphasis supplied);

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<sup>2</sup> The changes to the pertinent RPL regulations took effect December 8, 1988, subsequent to the time that appellant claims she should have been placed on the RPL and considered for the GS-11 position in question. Thus, as the agency concedes, the changes have no bearing on this case even though the position was not filled until January 1989. Moreover, as the administrative judge noted, the new guidelines provide that an individual who is eligible for the RPL because of a RIF action is entitled to be considered over outside candidates for vacancies at no higher grade and have no greater promotion potential than from which separated by the RIF. Thus, were the more recent provisions applicable in this case, appellant would not benefit thereby.

<sup>3</sup> In addition to the authorities cited by the agency, FPM Chapter 351, Subchapter 8-3 states, in pertinent part: "His or her eligibility and the agency's obligation extend to all positions and grades she or he qualifies for--including grades higher than he or she ever held."

(2) Under FPM Chapter 335, Subchapter 1-5 c.(5), agencies have discretion to except RPL candidates from competitive procedures for positions at higher grades than those they previously held; and,

(3) In comments in the Federal Register of Thursday, January 7, 1988, (Vol. 53, No. 4), at 409, OPM stated, "The current provision, which allows consideration for higher graded positions, has provoked concern by both employees and managers who feel it unfairly allows RPL eligibles to receive a noncompetitive promotion while other employees must compete for higher grade jobs."

Based upon the above, the Board finds that the appellant was entitled to be considered for GS-11 positions, for which she is indisputably qualified, pursuant to her placement on the agency's RPL list. Therefore, the administrative judge's basis for affirming the agency's action is erroneous.

The agency maintains that regardless of appellant's right to consideration for a GS-11 position for which she qualified, it chose, in its discretion, to fill the position at the GS-12 level, for which she indisputably does not qualify. The appellant, on the other hand, notes that under FPM Chapter 330, Subchapter 2-2, "When a qualified person is available on the agency's reemployment priority list, the agency may not fill a competitive position by the transfer of an employee of a different agency ...." (Emphasis supplied.) Here, the agency, in its discretion, decided to "fill" the position at the GS-12 level. Therefore, it was not obliged to consider

the appellant, since she was only qualified at the GS-11 level. See affidavit of John E. Flannery, Agency Exhibit 3, initial appeal file, tab 14. We conclude that appellant was not entitled to be considered for the position at issue.<sup>4</sup>

ORDER

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

NOTICE TO APPELLANT

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. See 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission  
Office of Review and Appeals  
1801 L Street, N.W., Suite 5000  
Washington, DC 20036

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7702(b)(1).

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<sup>4</sup> The appellant stated in her petition for review that had she known that she would not be considered for GS-11 advertised positions, she would have accepted a demotion pursuant to the RIF, rather than a separation. A separate appeal was filed from the RIF action. *Washington v. Department of the Navy*, MSPB Docket No. SF03518910016.

**Discrimination and Other Claims: Judicial Action**

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. See 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. See 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

**Other Claims: Judicial Review**


If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(b)(1). You must submit your request to the court at the following address:

United States Court of Appeals  
for the Federal Circuit  
717 Madison Place, N.W.  
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Washington, D.C.

  
Robert E. Taylor  
Clerk of the Board