UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

GARLAND B. WHITEHURST, Appellant, v. TENNESSEE VALLEY AUTHORITY, Agency.	DOCKET NUMBER SL03518910073 DATE: FEB 15 1990

Garland B. Whitehurst, Camden, Tennessee, pro se.

Thomas F. Fine, Esquire, Knoxville, Tennessee, for the agency.

BEFORE

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

OPINION AND ORDER

The appellant has filed a timely petition for review of an initial decision that affirmed the agency's action separating him through reduction-in-force (RIF) procedures. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.117, however, AFFIRM the initial decision as MODIFIED by this Opinion and Order, and SUSTAIN the agency's action.

BACKGROUND

The appellant was employed in the position of shift Captain, M-3, at the agency's Watts Bar nuclear plant. On September 30, 1988, pursuant to a RIF, the agency abolished the positions of shift Captain, M-3 (approximately twenty positions), Assistant Chief, M-4 and Chief, M-5 (a total of approximately ten positions) at the appellant's facility and the three other agency nuclear plants in his competitive area. In place of the abolished positions, the agency created the new position of Security Shift Supervisor, M-4 (ten positions). The appellant was not selected for appointment to one of the new Security Shift Supervisor positions. He filed a timely petition for appeal contending, inter alia, that the RIF was not bona fide because his former position of shift Captain and the new position of Security Shift Supervisor are the same.

The Initial Decision

After affording the appellant a hearing, the administrative judge issued an initial decision affirming the RIF action. The administrative judge found that the agency proved by a preponderance of the evidence that the official position descriptions and the parties' testimony showed that, while the two positions are similar with regard to major duties and functions, they are distinguishable in regard to (A) grade, (B) the greater experience and educational requirements of the new Security Shift Supervisor position,

and (C) the greater accountability and responsibility of the Security Shift Supervisor position. *See* Initial Decision at 2-6. Thus, the administrative judge found that the RIF was taken due to a bona fide reorganization. *See id.*; 5 C.F.R. § 351.201(a)(2).

The administrative judge also found that the appellant's stipulation of the propriety of his competitive level satisfied the agency's burden of proof on that issue. The parties also stipulated that the appellant's competitive area was too narrowly drawn because it only included the Watts Bar nuclear plant, whereas all four of the agency's nuclear plants (Watts Bar, Browns Ferry, Bellefonte, and Sequoya) are under one administrative authority. The administrative judge determined, however, that the agency's failure to consider the appropriate competitive area did not adversely affect the appellant's substantive rights because all of the shift Captain positions in the correct competitive area were abolished. Thus, the administrative judge found that the appellant was properly reached for release from his competitive level. The administrative judge, furthermore, found that the agency was not obligated by the RIF regulations to use the retention register to fill the new Security Shift Supervisor positions, and that the agency was not required to consider the appellant's retention standing in making its selections for the new positions. Finally, the administrative judge found that the appellant failed to establish that the RIF constituted age (52) discrimination, because he failed to

show that the RIF decision-makers considered age as a factor in effecting the RIF. *See* Initial Decision at 8-9.

The Petition for Review

The appellant's timely petition for review contends that: (1) The duties and responsibilities of the new position of Security Shift Supervisor, M-4, are identical to those of his former position of shift Captain, M-3, and the positions are the same; (2) he was affected by a transfer of function; (3) the administrative judge erred at the hearing by excluding certain documentary evidence in support of his arguments; (4) he meets the qualifications for selection for the new Security Shift Supervisor position, and the agency selected individuals for the new position with less seniority than he; and (5) in early February 1989, he obtained a revised position description for the new Security Shift Supervisor position, dated August 26, 1988, prior to the RIF, in which the agency has deleted some of the responsibilities and educational and experience requirements for the new position. The appellant also requests that the Board vacate the initial decision's findings on the issue of age discrimination because he wishes to file an age discrimination complaint with the Equal Employment Opportunity Commission (EEOC), which has allegedly agreed to accept his complaint. The agency has responded in opposition to the appellant's petition for review.

ANALYSIS

1. The Bona Fides of the RIF

Where an agency asserts that a RIF has been undertaken due to a reorganization, one of the reasons provided by 5 C.F.R. § 351.201(a), the burden is on the agency to show that the employee's position was actually abolished and is not continuing under a different title or grade. *See, e.g., Stechler v. Department of Energy*, 20 M.S.P.R. 23, 25 (1984), *aff'd*, 758 F.2d 666 (Fed. Cir. 1984) (Table).

The agency conceded, and the administrative judge found, that the appellant's former position of shift Captain and the new Security Shift Supervisor position shared generally corresponding duties and responsibilities. The official descriptions and the parties' testimony showed, however, that the grade, educational requirements, and reporting relationships of the positions were distinguishable. In conducting the reorganization, the agency abolished the positions of shift Captain, M-3, Assistant Chief, M-4, and Chief, M-5, which shared overlapping responsibilities. The agency combined the job elements of the three abolished levels of management into the new Security Shift Supervisor, M-4, position description. Consequently, this created a direct reporting relationship between the Security Shift Supervisor and the Site Security Manager, with more responsibility and accountability in the Security Shift Supervisor position and a more streamlined organizational structure with fewer supervisory levels and positions. *See* Initial Decision at

4-5. The shift Captain position description, furthermore, has no specific skill or knowledge requirements, whereas the Security Shift Supervisor position description requires 7 years' experience in nuclear security activities, including at least 2 years' supervisory experience in this area, and a college education background in criminal justice or law enforcement. *See* Initial Decision at 5; Initial Appeal File (IAF), Tab 14, Exhibit A, and Tab 8, Subtab 4f.

Under these circumstances, we concur with the administrative judge's determination that the agency established that a bona fide reorganization of the management functions of its security forces occurred that resulted in the abolishment of the shift Captain position and the creation of the new Security Shift Supervisor position. *See Stechler*, 20 M.S.P.R. at 25; *Kanner v. Department of the Army*, 19 M.S.P.R. 502, 505-06 (1984). *See also Farmer v. Department of Transportation*, 20 M.S.P.R. 384, 387 (1982) (abolishment of two positions and combination of their duties into a single new position was a planned management action which met the definition of a "reorganization" for RIF purposes).

2. Transfer of Function

The appellant contends that a transfer of function occurred in 1987 when the function of his former shift Captain position was transferred from the agency's public safety service to its nuclear security service, and then transferred to the agency's protective services when those organizations were combined on or about June 30, 1988. The appellant,

however, admitted on examination by the administrative judge that his security function was not transferred from the Watts Bar nuclear plant by the agency's reorganizations. *See* Hearing Transcript (H.T.) at 166-67.

A "transfer of function" is defined as the movement of work from one competitive area to another. *See* 5 C.F.R. § 351.301. A function is a clearly identifiable activity of the agency which consists of substantial authorities, powers, and duties authorized by law which combine to form a segment of the agency's mission. *E.g., Caviness v. Department of the Army*, 39 M.S.P.R. 548, 553 (1989). In the instant case, the appellant admitted that his security function was not moved out of the competitive area which included his Watts Bar nuclear plant. Therefore, he was not affected by a transfer of function. *See* 5 C.F.R. § 351.301; *Caviness*, 39 M.S.P.R. at 553.

3. Procedural Error by the Administrative Judge

The appellant contends that the administrative judge erred at the hearing by excluding two documents that he proffered in support of his arguments. The first docum proffered by the appellant consisted of a portion of the agency's regulations pertaining to transfer of function, in support of his argument on that issue.[1] The second document was a letter issued by the agency's management, dated April 29, 1988, prior to the reorganization and the RIF, that

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[1] *See* IAF, Tab 14, Exhibit C; H.T. at 4-9, 166-67.

directed a freeze on appointments and filling vacancies.[2] The administrative judge sustained the agency's objections to these proffered documents because they were not shown to be relevant to the appeal.

Although the appellant now contends that the administrative judge's exclusion of the documents was error, he failed to object on the record below to the administrative judge's evidentiary rulings. The appellant was obligated to preserve for the Board's review his objection to the administrative judge's conduct of the hearing. He cannot wait until after the adjudication is complete to object for the first time to the administrative judge's hearing related rulings. *See, e.g., Twine v. Department of Health and Human Services*, 36 M.S.P.R. 388, 393 (1988); *White v. Department of the Army*, 32 M.S.P.R. 600, 602 (1987); *Hill v. Department of Health and Human Services*, 28 M.S.P.R. 91, 92-93 (1985).

Even assuming that the appellant's arguments were properly preserved for our review, we find that the appellant has not shown that the administrative judge erred in this regard. As we have determined, the appellant was not affected by a transfer of function. Thus, the proffered portion of the agency's regulation was irrelevant to the appeal. Furthermore, he has not shown how the proffered agency letter directing a freeze on appointments, prior to the reorganization and the RIF, is relevant to the appeal. *See,*

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[2] *See* H.T. at 44-48, 88-89.

e.g., Brown v. Department of the Navy, 25 M.S.P.R. 300, 303 (1984).

4. Assignment to Other Positions

The appellant contends that he meets the qualifications for selection for the new Security Shift Supervisor position, and that the agency selected individuals with less seniority than he for the new position and for positions in different competitive levels. Employees of the Tennessee Valley Authority are in the excepted service, not the competitive service. *Dodd v. Tennessee Valley Authority*, 770 F.2d 1038, 1040 (Fed. Cir. 1985). As an excepted service employee, 5 C.F.R. § 351.703 does not require the agency to afford the appellant assignment rights to the new Security Shift Supervisor position or to any other positions outside of his abolished competitive level. *See Dodd*, 770 F.2d at 1040; *Mead v. Department of Justice*, 9 M.S.P.R. 283, 286 n.4, 291 (1981), *aff'd*, 687 F.2d 285 (9th Cir. 1982). Since the appellant was properly reached for release from his competitive level and he lacks assignment rights, his objections to the agency's selection of employees for assignment to other positions lack merit. *See, e.g., Dodd*, 770 F.2d at 1040-42; *Mead*, 9 M.S.P.R. at 291.

5. The New Position Description

The appellant contends that he discovered new and material evidence in early February 1989. He asserts that he obtained a revised position description for the new Security Shift Supervisor position, dated August 26, 1988, prior to the

RIF, in which the agency has deleted some of the responsibilities and educational and experience requirements for the new position, and that he is qualified for assignment to the new position.

The alleged position description is not "new" evidence, inasmuch as it was available before the close of the record at the conclusion of the hearing on December 20, 1988.[3] The appellant has not shown "due diligence" in reasonably explaining why the alleged new position description could not have been supplied earlier. *See* 5 C.F.R. § 1201.115; *Avansino v. United States Postal Service*, 3 M.S.P.R. 211, 214 (1980). Further, since the appellant has not submitted a copy of the alleged position description with his petition for review, we are unable to determine whether it is of sufficient weight to warrant an outcome different from that of the initial decision. *See Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980). Accordingly, we will not consider this allegation further.

6. The Age Discrimination Claim

The appellant, finally, requests that the Board vacate the initial decision's findings on the issue of age discrimination because he wishes to file an age discrimination and reprisal complaint with the EEOC, which he asserts the

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[3] The agency's human resource manager for nuclear support testified at the December 20, 1988 hearing, in contradiction to the appellant's present assertion, that the Security Shift Supervisor position description submitted by the agency is for the position as it "currently exists." *See* H.T. at 65; IAF, Tab 8, Subtab 4f.

EEOC has agreed to accept. He contends that he has been informed by former co-workers that the agency's RIF notice was erroneous in informing him that he could either appeal the RIF action to the Board or file an EEO complaint if he believed that the action was based on discrimination, but not both. The agency responds in opposition that its specific RIF notice[4] notified the appellant of the mixed appeal rights and properly informed him that he could pursue his case through an appeal to the Board or an EEO complaint with the agency, but not both.

The Board finds, contrary to the appellant's contention, that the agency's specific RIF notice correctly informed him (A) of the right to file a mixed case appeal with the Board or a mixed case complaint with the agency concerning the RIF action, but not both, and (B) that whichever was first filed would be considered an election to proceed in that forum. *See* 29 C.F.R. § 1613.403; 5 C.F.R. § 1201.154(c). Since the appellant filed his mixed case appeal with the Board first, the Board has the authority to adjudicate the appeal. *See, e.g., Nichols v. Department of the Navy*, 39 M.S.P.R. 41, 42-43 (1988); 29 C.F.R. § 1613.403.

The administrative judge has heard and adjudicated the appellant's age discrimination claim in the initial decision. The agency has indicated its opposition to the appellant's request to withdraw the adjudicated claim on petition for review. The Board has held that, in a case where the

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[4] *See* IAF, Tab 8, Subtab 4a.

appellant was aware of the alleged discrimination, yet initially chose to bring his action before the Board, the Board need not delay its jurisdiction based on the appellant's subsequent filing of an EEO complaint with the agency unless the parties agree and the administrative judge finds that to do so would be in the interests of justice. *See Dugger v. Department of Justice*, 3 M.S.P.R. 78, 80 (1980); *Cardenas v. United States Postal Service*, [illegible] M.S.P.R. 578, 579-80 (1980). Further, the appellant may request the EEOC to review the Board's final decision on his age discrimination claim. The Board finds under the circumstances of this case that a delay of the Board's jurisdiction over this case would not be in the interests of justice. Therefore, we deny the appellant's request to withdraw his age discrimination claim and to vacate the initial decision's findings concerning the issue of age discrimination.

ORDER

This is the final decision of the Merit Systems Protection Board in this appeal. *See* 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).

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:

Robert E. Taylor
Clerk of the Board

Washington, D.C.