UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

62 M.S.P.R. 30

Docket Number AT-0351-94-0051-I-1

MONTE M. SIMONTON, Appellant,

v.

DEPARTMENT OF THE ARMY, Agency.

Date: April 12, 1994

Rodney E. Baker, Cataula, Georgia, for the appellant.

Bernard Pfaiffero, Esquire, Daniel Winand, Esquire, Cpt. J. Markley, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Jessica L. Parks, Vice Chairman
Antonio C. Amador, Member

OPINION AND ORDER

This appeal is before the Board on an interlocutory appeal from the administrative judge's order of January 5, 1994, ruling that (1) the fact that the appellant's former position was upgraded should not preclude him from exercising reduction-in-force (RIF) retreat rights to that position and that (2) the parties would not be allowed to present testimony relating to the actual duties performed in the jobs in question. The administrative judge certified his order for review under 5 C.F.R. § 1201.93 on January 21, 1994.

BACKGROUND

The appellant appealed to the Board's Atlanta Regional Office from the agency's RIF action demoting him to a Firefighter, GS-081-06, position, effective October 3, 1993, from his Firs Inspector, GS-081-08, position. See Initial Appeal File (IAF), Tab 1. He contends that he has retreat rights to the Lead Firefighter, GS-081-07, position because it is "essentially identical" to the position that he previously occupied as a Lead Firefighter, GS-081-06. *See* 5 C.F.R. § 351.701(c)(3).

The agency does not dispute that the appellant previously held that position. See IAF, Tab 16. It alleges, however, that the positions are not essentially identical because the appellant's former position was subsequently upgraded to the GS-7 level. It states

that this position was upgraded "primarily" because of a new classification standard from the Office of Personnel Management (OPM), but, even if the positions were at the same grade, "the differences between the new and old duties may be sufficient to render the positions not 'essentially identical.'" See IAF, Tabs 16, 17, 18.

In his January 5, 1994 Order, the administrative judge confirmed his prehearing conference ruling that he would consider more than the position descriptions of record, but that he would not allow the parties to present testimony regarding the actual duties performed. Further reaffirming his rejection of the agency's contention based on the different grade levels of the positions, he concluded that the appellant did not lose his retreat rights to his former position just because he did not occupy it when it was upgraded. See IAF, Tab 20. In his January 21, 1994 Order certifying the interlocutory appeal, the administrative judge stated that it is not clear what evidence should be considered in determining whether two positions are the same or substantially similar. *See* IAF, Tab 23.

ANALYSIS

The Merits Issue

In support of its contention regarding the grade level, the agency relies on Federal Personnel Manual (FPM) Supplement 351-1, subsection S-5-5d (Sept. 18,1989). That provision states that a position is considered "essentially identical" if "the agency determines on the basis of the information available that the two positions are enough alike that, under the criteria set forth in subsections S3-3a and b, they would be placed in the same competitive level if they were in the same competitive area."[1] While subsection 83-3a sets forth as a "characteristic" of a competitive level (for the purpose of determining first round competition) that all the positions it includes be in the same grade or occupational level, we find this not to be diapositive of the issue before us, See also 5 C.F.R. S 351.403(a).

First, we note that FPM provisions merely constitute guidance to agencies and that we are not bound to follow them. *See Donaldson v. Department of Labor,* 27 M.S.P.R. 293, 296 (1985)-[2] Further, we note that, before an agency can invoke RIF regulations based on the abolishment of a job, it must establish that an appellant's position was actually abolished and that it did not continue under a different grade or title. *See, e.g., Holmes v. Department of the Army,* 41 M.S.P.R. 612, 616 (1989), *aff'd*, 914 F.2d 271 (Fed . Cir. 1990). Nor do the regulations apply where a position is reclassified because of the application of new standards, the correction of a classification error, or (with limited exceptions) an erosion of duties. See 5 C.F.R. § 351.202(c)(2), (c)(3).

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[1] The FPM gives only one example of a position to which an employee would not have retreat rights, i.e., in the case of a Veterans Readjustment Appointment where the former position in the excepted service is otherwise similar to that held by an employee in the competitive service.

[2] We note, too, that the agency has not shown that the specific provisions of the FPM on which it relies survived OPM's cancellation of most of the manual.

While we recognize that the issue here does not involve the abolishment of the appellant's position at the time of the RIF but rather the earlier reclassification of his former position, we find that our underlying concern for requiring that an agency show a bona tide reason for the RIF action, i.e., that employees not be deprived of their jobs by simply "slipp(ing)" their duties under the shell of a new position with nothing of substance having changed, applies to the limited situation at issue here. *See Hoffman v. Department of Housing & Urban Development*, 22 M. S. P. R. 564, 568 (1984), quoting *Losure v. Interstate Commerce Commission*, 2 M.S.P.R. 195, 199 (1980). We find, as the administrative judge concluded, that an employee should not be deprived of his retreat rights to a former position simply because the duties that he performed in that position have been determined by a classification action to warrant a higher grade than when he occupied that position.

In this connection, we find it significant that the agency acknowledges that the appellant's former position was upgraded primarily because of the application of a new classification standard, even though it contends that there has also been an evolution of duties. In *Russell v. Department of the Navy*, 6 M.S.P.R. 698, 710-11 (1981), we found that the appellant was constructively reduced in grade when he was reassigned from a position that was subsequently upgraded where he would have received the promotion but for his reassignment. There, we noted the importance of the classification system to the integrity of the merit system and that an employee's entitlement to the correct grade was a benefit that resulted from its proper operation. *Id*. at 710. We also note that the purpose of setting competitive levels under the regulations is to ensure that positions that are truly alike be made available for competition. *See* 5 C.F.R. § 351.403. Grade level is only one usual indication of such similarity.

While the agency has an interest in minimum disruption during a RIF, we find that such interest is outweighed where an appellant establishes that he would have been entitled to the higher grade in his former position.[3] To the extent that there has been a change in duties here so that the positions are not the same, this issue will be reviewed by the administrative judge in deciding whether the positions are essentially identical. *See Holliday v. Department of the Army,* 12 M.S.P.R. 358, 362 (1982) (qualifications required by duties of positions as set forth in position descriptions, not the personal qualifications of specific incumbents, determine composition of competitive levels). In this connection, we note that the appellant's former position has not been upgraded to a level at or above that of his job at the time of the RIF, and we therefore do not address what would happen if it had been. But *see* 5 C.F.R. § 351.704(b)(1). Compare *Sokol v. Department of Education*, 19 M.S.P.R. 466, 470 (1984) (the appellant had retreat rights to a GM-14 position based on his prior incumbency of a GS-14 position) with 5 C.F.R. 5 351.403(b)(3), (b)(5) (requiring different competitive levels for jobs in different pay systems and based on differing supervisory/nonsupervisory status).

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[3] Indeed, had the appellant been reassigned before its reclassification, he may have claimed that he was subjected to a reduction in grade and filed an appeal to the Board. See Russell, 6 M.S.P.R. at 710-11.

Accordingly, we agree with the administrative judge's ruling that the appellant is not precluded from exercising his retreat rights to his former position solely because it was reclassified to a higher level after he no longer occupied it.

The Evidentiary Issue

We now turn to the issue of whether the administrative judge should allow the parties to submit testimony regarding the actual duties performed. In determining that the Board's position was not clear, he reviewed our decisions in *Marcinowsky v. General Services Administration*, 35 M.S.P.R. 6, 9-10 (1987) (where we considered the critical elements and performance standards in determining whether the positions belonged in the same competitive level); *Lover v. Department of Health & Human Services*, 23 M.S.P.R. 407, 409 (1984) (where we found that the results of a "position review" were admissible in determining a retreat rights claim); and *Burbridge v. Government of the District of Columbia*, 13 M.S.P.R. 360, 362 (1982) (where we found that the propriety of separate competitive levels was shown by the position descriptions of record inasmuch as the appellant failed to present further evidence showing specific similarities of duties performed by incumbents of both positions). *See* IAF, Tab 23 at 2-3. Finally, the administrative judge, noting that it was the most recent of the decisions cited, quoted our decision in *Marcinowsky*, 35 M.S.P.R. at 9 (citations omitted), stating that:

> The duties and responsibilities of the official position descriptions have been, and continue to be, an appropriate and necessary means by which to determine the composition of a competitive level.

Id. at 2.

We reaffirm our statement in *Marcinowsky*. We find that whether positions are in the same competitive level is mainly determined by the official position descriptions, even though other evidence may also be relevant in light of the circumstances. In *Schroeder v. Department of Transportation*, MSPB Docket No. DE0351930096I1, slip op. at 13-14 (Jan. 25, 1994), we found that there were apparently significant differences in the duties, qualification requirements, and working conditions to the extent that an incumbent of one position may not be able to successfully perform the critical elements of the other position without any abnormal loss of productivity. In making that determination, we relied solely on our review of the pleadings and of the position descriptions. *Id*. at 13. Similarly, we have relied mainly on a comparison of the official position descriptions in determining whether a position was actually abolished. *See Holmes*, 41 M.S.P.R. at 616 ("The Board will examine all of the record evidence, particularly the position descriptions, in making this determination").

That we have relied on the official position descriptions, however, does not mean that we have excluded other relevant evidence, including testimony, especially where such evidence sheds light on the position descriptions. *See Marcinowsky,* 35 M.S.P.R. at 10 (the applicable FPM provision includes agency examination of the critical elements and the performance standards, as well as the position descriptions; the administrative judge properly supported his finding, that the positions required different subject matter and technical expertise that could not be readily acquired, based on the

statements of the agency official whoa he credited); Lover, 23 M.S.P.R. at 409 (the position review contained a position description indicating that the appellant supervised three employees rather than one as claimed by the agency): Burbridge, 13 M.S.P.R. at 362, citing *Wright v. Department of Commerce*, 9 M.S.P.R. 472, 475 (1982) (the testimony and the agency admissions can form a sufficient basis for deciding the propriety of the competitive level absent the official position description). And, as noted above, the relevant FPM provision, subsection S-5-5d, states that the °essentially identical" determination is made "on the basis of the information available.° Thus, it doss not appear to limit consideration solely to the position descriptions.

Accordingly, we find that the administrative judge should allow the parties to present testimony regarding the actual duties performed in the positions in question, but only to the extent that such evidence is material and relevant to an understanding of the appropriate position descriptions, critical elements and performance standards. *Cf. United States v. Testan*, 424 U.S. 392 (1976) (one is not entitled to the benefits of a government position unless he has been duly appointed to it).

For the Board
Robert E. Taylor, Clerk
Washington, D.C.