

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2011 MSPB 14

Docket No. DE-0752-08-0233-X-1

**Beverly Gorny,
Appellant,**

v.

**Department of the Interior,
Agency.**

February 3, 2011

Bruce T. Moats, Esquire, Cheyenne, Wyoming, for the appellant.

Amy Duin, Esquire, Lakewood, Colorado, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 This case is before the Board based on the administrative judge's Recommendation finding the agency in partial noncompliance with a final Board order. MSPB Docket No. DE-0752-08-0233-C-1, Compliance File (CF), Tab 21. For the reasons set forth below, we find the agency has brought itself into compliance with the administrative judge's recommended order on all but one issue. Therefore, we must find that the agency remains in partial noncompliance with the final Board order.

BACKGROUND

¶2 The agency removed the appellant effective July 31, 2007. MSPB Docket No. DE-0752-08-0233-I-1, Initial Appeal File (IAF), Tab 1. In an initial decision dated December 23, 2008, the administrative judge reversed the agency's removal action and ordered, *inter alia*, that the agency cancel the removal, retroactively restore the appellant, and pay the appropriate amount of back pay. IAF, Tab 24 (Initial Decision) at 24. The agency filed a petition for review with the Board, which the Board denied in a final order on April 27, 2009. Petition for Review (PFR) File, Tab 7.

¶3 On July 24, 2009, the appellant filed a petition for enforcement, alleging, in pertinent part, that the agency failed to comply with the final order by failing to restore her either to her former position of public affairs specialist or an equivalent position.¹ CF, Tab 1 at 4. The administrative judge held a hearing on the petition for enforcement on December 10, 2009, and closed the record after receiving written arguments on December 18, 2009. CF, Volume 5, Tab 18 (hearing transcript).

¶4 On April 5, 2010, the administrative judge found the agency failed to reinstate the appellant to her former position and duties, but had a compelling reason for not doing so. CF, Tab 21 (Recommendation) at 4. Namely, as the result of a November 2007 reorganization, the appellant's former position no

¹ The appellant's petition for enforcement also alleged that the agency: (1) inappropriately deducted her outside earnings from her back pay award, (2) did not allow her to deduct Thrift Savings Plan (TSP) "catch-up" contributions, (3) did not fully credit her leave, (4) did not correct her SF-50, and (5) failed to demonstrate that the amount of interest paid on back pay was correct. Recommendation at 3. Before the administrative judge issued her Recommendation, the parties agreed that there were only two remaining issues: (1) whether the agency restored the appellant, and (2) whether the appellant's outside earnings were properly deducted from her back pay award. *Id.* The administrative judge's Recommendation found the appellant's allegation regarding outside earnings unfounded, agreeing with the agency's deduction of the appellant's outside earnings. Recommendation at 12. The appellant has not challenged the administrative judge's finding in this regard.

longer exists. Recommendation at 5. However, the administrative judge found that the agency failed to fulfill its subsequent obligation to assign the appellant duties and responsibilities that are substantially equivalent in scope and status to those of her previous position. Recommendation at 6. Thus, the administrative judge issued a Recommendation to grant the appellant's petition for enforcement in part. *Id.* at 12. Accordingly, this matter has been referred to the Board to obtain compliance.

ANALYSIS

¶5 When the Board finds a personnel action unwarranted, the aim is to place the appellant, as nearly as possible, in the situation she would have been in had the wrongful personnel action not occurred. *See Tubesing v. Department of Health and Human Services*, [112 M.S.P.R. 393](#), ¶ 5 (2009) (citing *House v. Department of the Army*, [98 M.S.P.R. 530](#), ¶ 9 (2005)). This is called *status quo ante* relief. *Id.*; *Kerr v. National Endowment for the Arts*, [726 F.2d 730](#), 733 (Fed. Cir. 1984).

¶6 As the administrative judge noted, for an agency to comply with a Board order to reinstate an employee, the agency generally must return the employee to her former position. Recommendation at 4 (citing *Miller v. Department of the Army*, [109 M.S.P.R. 41](#), ¶ 11 (2008)). If the agency does not return the employee to her former position, it must show first that it has a strong overriding interest or compelling reason requiring reassignment to a different position, and second that it has reassigned the employee to a position that is substantially similar to the former position. *Id.* In analyzing such an issue, the Board must look beyond the title and grade of the positions involved, and must compare the scope of the actual duties and responsibilities of the new position with those of the former position. *Id.*

¶7 The agency, in response to the administrative judge's finding of noncompliance, submitted a statement that it has assigned the appellant to a

“restored” Public Affairs Specialist position in the agency’s Office of Communications. Compliance Referral File (CRF), Tab 3 at 4. The agency also submitted an SF-50 of the reassignment and a position description. *Id.* at 8 and 10. This position description provides that the position was classified as part of a “reestablishment” on April 13, 2010. *Id.* at 10 and 18. The agency claims that the reassignment places the appellant “in the same office, at the same grade, and on the same position description as . . . the only other GS-12 Public Affairs Specialist in the Wyoming State Office,” and that the “duties and responsibilities . . . are the same as those of her former position.” Thus, the agency claims, it has fully complied with the administrative judge’s Recommendation. CRF, Tab 3.

¶8 The appellant filed a response to the agency’s submission. CRF, Tab 4. The appellant concedes that her reassignment places her in “the position she held before she was illegally terminated by the Agency,” except with respect to three matters: (1) the physical location of her office, (2) the topical focus of her public affairs duties, and (3) the lack of a provision in the position description to specify that she can act as chief in the absence of a superior. *Id.* at 4. We note that the appellant’s response does not dispute the administrative judge’s finding that the agency had a compelling reason for abolishing her prior position and conducting a reorganization.² We note also that the appellant does not claim that the agency has failed to assign her public affairs duties generally; instead, her only challenge is to the topical focus of her public affairs duties and the absence of a

² The administrative judge found the agency proved that it merged the Office of External Affairs with the Visual Communications Team in order to increase efficiency between the two groups and mirror other agency offices which all included the Visual Communications employees in their Office of External Affairs or Office of Communications. Recommendation at 5. The administrative judge found that the reorganization resulted in the reduction of one full-time Public Affairs Specialist position after the duties were reassigned to two other employees. *Id.* The eliminated position was the one formerly held by the appellant. *Id.*

specification in her position description that she can act as chief. CRF, Tab 4. We address each issue in turn below.

The agency is in partial noncompliance with its obligations regarding the appellant's physical office location.

¶9 The appellant alleges that the agency has failed to fulfill its duty to restore her as nearly as possible to the *status quo ante* in regard to her physical office location. The appellant challenges two aspects of her office location: (a) it is inferior to the office she occupied before her removal, as her prior office had a window, and (b) it is separated from the Office of Communications, on a different floor, which “communicates to other BLM employees that she is still not an accepted member of the office.” CRF, Tab 4 at 4-5.

¶10 The Board takes guidance from its analysis in *Payne v. U.S. Postal Service*, [77 M.S.P.R. 97](#) (1997), and *Tubesing*, [112 M.S.P.R. 393](#). In *Payne* the Board found the appellant was not entitled to be returned to her private office as part of a *status quo ante* remedy, when she failed to introduce evidence that she was harmed by not having a private office. 77 M.S.P.R. at 101. In *Tubesing* the Board re-affirmed that principle, holding that when an agency reinstates an appellant to duty, it has the discretion to change her work schedule, in the absence of a pay differential or other evidence of harm. [112 M.S.P.R. 393](#), ¶ 19.

¶11 In the case at hand, the appellant has not shown how she has been harmed by not having a window office. Thus, she has not established that a window office falls within the *status quo ante* remedy, and we decline to order such a remedy. *Id.*

¶12 The appellant has, however, demonstrated harm by being physically separated on a different floor from the Office of Communications. One of the bases for the administrative judge's finding that the agency failed to place the appellant in a position equivalent to her former position was that the agency had placed her in “a separate area from all of the other Public Affairs Specialists.” Recommendation at 9. The administrative judge found that “her exclusion from

the Office of Communications has resulted in her isolation from all of the other Public Affairs Specialists who actually perform public affairs duties.” *Id.* The agency’s submission in response to the administrative judge’s Recommendation does not dispute this finding, but it also does not provide any evidence that it has physically relocated her. CRF, Tab 3 at 1. We agree with the administrative judge’s Recommendation on this issue, and because the agency has not submitted evidence of its compliance here, we find the agency to be in noncompliance.

¶13 The appellant reports, and does not dispute, a claim by the agency that it is conducting a “space analysis” to accommodate more individuals in the Office of Communications. CRF, Tab 4 at 4-5. However, pending completion of the agency’s space analysis and implementation of any office-wide changes, the appellant asks to be returned to her prior office or a comparable office. *Id.* The appellant suggests that the agency could accomplish returning her to her prior office or a comparable office, by moving any current occupant to an office that is used by interns, and by moving any such interns to her current office, which is physically separated from the Office of Communications. *Id.* The agency has not filed any evidence contradicting the appellant’s factual assertions on this issue.

¶14 The Board notes that the displacement of other individuals is sometimes necessary to afford an appellant, as nearly as possible, *status quo ante* relief. *Cf. Taylor v. Department of the Treasury*, [43 M.S.P.R. 221](#), 227 (1990) (rejecting agency argument that it would be unduly disruptive to return an appellant to her former position because it would displace the current incumbent). For the agency to come into compliance on this issue, the agency will need to submit evidence that it has restored the appellant to office space that is in the same physical area as her co-workers and that is commensurate with the office space of her co-workers of similar status and responsibilities.

The agency has complied with its obligation to reassign the appellant to duties and responsibilities that are substantially similar to those of her former position.

¶15 In analyzing whether an agency has reassigned an employee to a position that is substantially similar to her former position, the Board looks beyond the title and grade of the positions involved, and compares the scope of actual duties and responsibilities of the new position with those of the former position. *Miller*, [109 M.S.P.R. 41](#), ¶ 11, *Tubesing*, [112 M.S.P.R. 393](#), ¶ 7.

¶16 In this case, the parties have provided the Board with copies of the new and former position descriptions to compare. Nonetheless, in *Tubesing*, the Board found it improper to rely on such position descriptions alone, to the exclusion of rebuttal evidence by the appellant that the position description did not reflect the duties he was actually being assigned. *Tubesing*, [112 M.S.P.R. 393](#), ¶¶ 8, 9. Mr. Tubesing submitted a sworn statement that he was performing little or no work commensurate with his grade and position, and the agency offered nothing to rebut his assertion. *Id.* at ¶ 8. Weighing that evidence, the Board found the agency in noncompliance in *Tubesing*. *Id.* at ¶ 9.

¶17 As *Tubesing* makes clear, position descriptions are only one item of evidence and may be rebutted by evidence that an appellant is not actually performing the duties therein. Here, however, the appellant does not contend that the position description is inaccurate. Instead, she contends that the new position description itself reflects that the agency has not assigned her duties and responsibilities that are substantially similar to those of her prior position. The appellant's only disputes over the duties and responsibilities of her new position are: (1) the topical focus of her public affairs duties; and (2) the lack of a provision specifying that she can act as chief in the absence of a superior. CRF, Tab 4 at 4.

¶18 The underlying issue is not whether the appellant's new position is identical to her prior position, but whether it is substantially similar. As the Board has previously reasoned, "Since the appellant's former position has been

abolished, [the appellant]'s placement in a different position necessarily involves the performance of different duties." *Marion v. U.S. Postal Service*, [79 M.S.P.R. 443](#), 444 (1998). In analyzing this question, we compare the appellant's former position description with her current one. CRF, Tab 4 at 8-12, Tab 3 at 7-20. We also consider whether there is any evidence that the agency currently has a position that is more comparable to the position the appellant previously performed. *Higashi v. Department of the Army*, [26 M.S.P.R. 330](#), 332 (1985).

1. The topical focus of the appellant's new position is substantially similar to that of her former position.

¶19 The appellant maintains that an essential duty of her prior position was public affairs work on oil, gas, and coal issues, and that her prior position description reflected that. CRF, Tab 4 at 5. The appellant claims that her new position description "does not include these duties," and that "[t]herefore, her duties and responsibilities are not the same as those of her former position." *Id.*

¶20 In brief, the Board does not find by a preponderance of the evidence that the appellant is not performing public affairs duties with oil, gas and coal issues in her new position; in any event, the Board does not find that public affairs duties with oil, gas and coal issues were an essential aspect of the appellant's prior position.

¶21 First, as noted earlier in this decision, position descriptions are only one item of evidence that the Board considers in analyzing whether an agency has reassigned an employee to a position that is substantially similar to her former position. *Tubesing*, [112 M.S.P.R. 393](#) at ¶ ¶ 7-9. Thus, the current position description's failure to mention oil, coal, and gas is not necessarily dispositive. Moreover, the appellant fails to squarely assert that her public affairs duties do not still include oil, coal, and gas; instead, she writes that she "does not object" to her position's duties "as long as she is able to take advantage of her reputation and expertise in oil, gas and coal. It is too soon to tell whether this will happen or not. Therefore, Appellant reserves the right to object in the future should this

continue as an issue." The Appellant has submitted only speculation that her public affairs duties will not include issues with oil, coal, and gas.

¶22 Second, the appellant fails to establish that public affairs duties with oil, coal, and gas were an essential aspect of her prior position. The appellant refers the Board to her prior position description, which she claims "reflected that her duties would be focused in those areas." CRF, Tab 4 at 5. However, the appellant does not identify where her prior position description contains such a provision. CRF, Tab 4 at 10. Nor is such a provision apparent, even in the most relevant part of the position description:

The objective of [the Office of Public Affairs] is to involve, inform, and motivate the public throughout the State of Wyoming and adjoining areas in order to facilitate land management decisions in Wyoming that protect the public interest.

* * *

Traditional uses which have dominated the land must often be adjusted to provide for the best multiple use practices. In addition, many of the Bureau's programs in Wyoming which affect specific land uses such as energy development have regional and even national impacts. This situation calls for a continued and concentrated public involvement program with highly qualified public information personnel. The public information specialist assists in the development and continuation of the public affairs activities for these programs[.]

Id. at 10. These provisions fail even to assert that public affairs work on the topic of energy development, in general, is an inseparable aspect of the prior position. Instead, these provisions merely mention "energy development" as one topic with which the public affairs specialists might work.

¶23 To be sure, the Board looks further than the prior position description and also considers the findings of the administrative judge that mentioned oil, gas, and coal:

Before her removal, she was the main Congressional liaison who handled all of the work related to Congressional hearings; she was the main contact for oil, gas, and coal and land use planning. . . .

Since her reinstatement, she has not responded to any Congressional inquiries.

* * *

She has not been able to use her expertise she gained over the years due to her isolation from the public affairs staff, and no longer has regular communications with the Washington, D.C. office of Public Affairs like she once did.

Recommendation at 8. Although the administrative judge found that the appellant worked with oil, gas and coal issues, the judge did not find that these particular topics were inseparable from the prior position. Instead, the administrative judge's conclusion was that the appellant was not performing public affairs duties at all; the agency was assigning her duties that were "mainly clerical in nature." *Id.* at 9. The administrative judge found these clerical duties did "not reflect even close to the full range of her responsibilities and duties while employed as a Public Affairs Specialist." *Id.* In reaching that finding, the administrative judge, consistent with *Tubesing*, properly looked beyond the mere title and grade of the appellant, and found that she was not actually performing the duties of a public affairs specialist. However, the agency has since assigned the appellant to public affairs duties, and the appellant's only dispute here is speculation over the topical focus of those public affairs.

¶24 The Board considers also that the appellant has never disputed the agency's claim that the other public affairs specialist has the identical position description. Nor has the appellant alleged that the agency in fact reassigned the appellant's prior work on oil, gas and coal to this other public affairs specialist.

¶25 Based on the above evidence, the Board does not find that public affairs duties with oil, gas and coal issues were an essential aspect of the appellant's prior position; if anything, the essential focus of the appellant's prior public affairs duties was on land management in general. This finding is further consistent with the fact that the prior position description – which was classified twenty years ago in 1990 – recognized that "[t]raditional uses which have

dominated the land must *often* be adjusted to provide for the best multiple use practices.” CRF, Tab 4 at 10 (emphasis added). The prior position description dictated no permanent focus on one land use over another, but instead recognized that the focus of the public affairs work must often adjust. *Id.* at 10. Further, on March 11, 2009, the Secretary of Interior issued an Order establishing renewable energy as a priority for the Department of Interior. Recommendation at 6; CF, Tab 17 at 5-8. That shift further erodes any inference that public affairs duties with a focus on oil, gas and coal issues were critical to the prior position. Therefore, the Board finds that the topical focus of the appellant’s new position is substantially similar to that of her former position.

2. The appellant’s responsibilities are substantially similar to those of her former position despite the absence of an “acting chief” responsibility.

¶26 The appellant’s prior position description, created in 1990, specified that she “serve[d] as supervisor of the Office of Public Affairs in the absence of the Chief, OPA.” CRF, Tab 4 at 6, 10. The appellant’s new position description contains no such provision, and the appellant contends that this absence makes her new position substantially different from her prior position.

¶27 To connect that position description to the present day, we assume, without finding, that at some point after 1990, the Office of Public Affairs was renamed the Office of External Affairs, because the appellant’s July 31, 2007 removal notice identifies her as working in the Office of External Affairs. IAF, Tab 7, Subtab 4f. In November 2007, the agency merged the Office of External Affairs with the Visual Communications Team to create the Office of Communications. Recommendation at 5. This re-organization put the two-member Visual Communications Team under the control of the Office of Communications. *Id.*

¶28 The appellant asks the Board to rewrite her current position description to ensure that she retains the “acting chief” responsibility she was described as having in 1990, when she worked in an office that had a different name, organization and set of circumstances than the present Office of Communications.

The appellant puts forth no evidence as to when or how often she in fact acted as chief of the Office of Public Affairs. Nor does the appellant put forth any evidence that another individual in the Office of Communications, such as the other public affairs specialist, is being designated as acting chief.

¶29 Under the above facts, the Board cannot conclude that the agency's failure to write an "acting chief" responsibility into the appellant's position description means that her new, actual duties are not substantially similar to her prior duties. Similarly, we do not construe the new position description to preclude the possibility that the agency might designate the appellant as an acting chief.

ORDER

¶30 As set forth above, the agency has failed to fully comply with the Board's final order on the merits of the appellant's appeal of her separation. Accordingly, we ORDER the agency to submit to the Clerk of the Board within 30 days of the date of this order satisfactory evidence of compliance with this decision.

¶31 To be in compliance, the agency must restore the appellant to office space that is in the same physical area as her co-workers and that is commensurate with the office space of her co-workers of similar status and responsibilities.

¶32 The appellant is directed to cooperate with the agency in good faith in meetings its compliance obligations. The appellant may respond to the agency's evidence of compliance within 15 days of date of service of the agency's submission. If the appellant does not respond to the agency's evidence of

compliance, the Board may assume that she is satisfied with the agency's actions and dismiss the petition for enforcement.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.