UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 10

Docket Nos. PH-0752-09-0473-I-1
PH-0351-09-0391-I-1

Shirley Jones,

Appellant,

v.

Department of Agriculture,

Agency.

January 27, 2012

Charles W. Day, Jr., Esquire, Washington, D.C., for the appellant.

Sandra J. Fortson, Esquire, Beltsville, Maryland, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The agency has filed a timely petition for review of the initial decision that reversed the appellant's reduction in grade and subsequent resignation as involuntary. For the reasons explained below, we AFFIRM the initial decision as MODIFIED by this Opinion and Order, still REVERSING the appellant's downgrade and resignation.

BACKGROUND

¶2 By letter dated August 7, 2007, the agency notified the appellant that her position of Management Assistant (MA), GS-6, with the Beltsville, Maryland District Office of the agency's Food Safety and Inspection Service (FSIS), was being "abolished." Appeal File, Docket No. PH-0351-09-0391-I-1 (AF1), Tab 9, Subtab 3b, Ex. 14. The agency explained that the "Compliance" functions of her position had previously "been transferred out of the district office[,]" that her position description did not accurately reflect the activities she was currently performing, and that the MA position was "technically no longer part of the district office organizational structure." *Id.* The agency offered the appellant the choice of two vacant positions: a GS-6 Secretary position in Lombard, Illinois, and a GS-5 Resource Management Assistant (RMA) position in the Beltsville District Office. *Id.* The agency advised that if the appellant accepted reassignment to the GS-6 position, she may be entitled to moving expenses, and that if she accepted demotion to the GS-5 position, she may be entitled to pay retention. The agency further stated that "If you elect to resign or retire rather than accept either of the positions offered, the effective date can be no later than August 21, 2007." *Id.*

¶3 The appellant accepted the agency's offer of a downgrade to the GS-5 position in Beltsville, *id.*, and was appointed to this position, with pay retention, effective September 16, 2007. AF1, Tab 9, Subtab 3b, Ex. 15. The appellant filed an equal employment opportunity (EEO) complaint regarding her alleged involuntary reduction in grade on November 28, 2007. AF1, Tab 9, Subtab 3b, Ex. 3. The appellant resigned, effective October 10, 2008, AF1, Tab 9, Subtab 3c, Ex. 14. On December 1, 2008, the appellant's EEO complaint was amended to include the claim that her resignation was also involuntary. AF1, Tab 9, Subtab 3c, Ex. 1.

¶4 On April 13, 2009, the appellant filed the present appeal with the Board, alleging that both her September 16, 2007 downgrade and her October 10, 2008

resignation were involuntary. AF1, Tab 1.[1] The appellant also alleged that the agency engaged in discrimination based on race (African American) and age, and retaliation for prior EEO activity. *Id.*

¶5 After denying the agency's motion to dismiss the appeals as untimely, and following a jurisdictional hearing conducted on May 20, 2010, the administrative judge found that both the appellant's downgrade and resignation were involuntary and must be reversed by operation of law. ID. Specifically, the administrative judge found that, by failing to place the appellant in a GS-6 MA vacancy that existed in her commuting area, the agency violated its own Work Reduction Procedures by improperly directing her reassignment to the GS-6 Secretary position in Illinois. ID at 11-20. The administrative judge found that this improperly directed reassignment resulted in the appellant's involuntary acceptance of a downgrade to the GS-5 RMA position. ID at 20-21. The administrative judge further found that, because the appellant's subsequent resignation was also obtained as a result of this improperly directed reassignment, it too was involuntary. ID at 21-23. Finally, the administrative judge found that the appellant did not establish her affirmative defenses of discrimination and retaliation. ID at 23-34.

¶6 In its petition for review, the agency argues that, contrary to the administrative judge's findings, the appellant was not issued a directed reassignment to the GS-6 Secretary position in Illinois, but was instead offered a choice between accepting this position and the GS-5 RMA position in Beltsville. Petition for Review (PFR) File, Tab 3. The agency argued that the offer of this

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[1] The appellant's appeal was initially docketed as two separate cases: a reduction in grade appeal pursuant to reduction in force (RIF) procedures (PH-0351-09-0391-I-1), and an alleged involuntary resignation/constructive removal appeal (PH-0752-09-0473-I-1). The administrative judge subsequently determined that the appellant's downgrade did not constitute a RIF action, and joined the two appeals pursuant to 5 C.F.R. § 1201.36(a)(2). Appeal File, Docket No. PH-0752-09-0473-I-1 (AF2), Tab 23, Initial Decision (ID) at 1, 10-11.

choice was consistent with its Work Reduction Procedures. *Id.* The agency further argued that the administrative judge erroneously determined that the agency violated these procedures by failing to place the appellant in the vacant GS-6 MA position in question, asserting that such a placement was prohibited by 5 C.F.R. § 335.103(c)(iv).

¶7 In her response to the agency's petition for review, the appellant argues that, following the abolishment of her position, the agency should have afforded her RIF procedures. PFR File, Tab 5 at 7-8. The appellant further argues that the agency's Work Reduction Procedures have no force of law, and, alternatively, that the administrative judge correctly found the agency had violated them by not assigning her to the vacant GS-6 MA position. *Id.* at 10. The appellant also notes that the agency delayed 5 years before notifying the appellant that her position had been abolished, causing her to lose unspecified "reassignment opportunities." *Id.* at 5, 11.

ANALYSIS

¶8 As the administrative judge noted, it is undisputed that the appellant's downgrade was not effected as a part of a RIF. *See* ID at 10-11. The agency contends that the appellant voluntarily elected the downgrade in lieu of accepting its offer to reassign her to the GS-6 Secretary position in Illinois, pursuant to the terms of its Work Reduction Procedures. PFR File, Tab 3 at 2-3, 6-7. These procedures are set forth in FSIS Directive 4300.1, entitled "Reassignment of Food Inspectors in Work Reduction Situations."[2] AF1, Tab 9, Subtab 3b, Ex. 20 at 2.

¶9 The Directive states that "[i]t is FSIS policy to avoid reductions in force, when possible, by reassignments to vacant positions at the same grade and salaries." *Id.* The Directive also states that it covers reassignments "to vacant

[2] The record reflects that the agency may apply FSIS Directive 4300.1 to all FSIS employees in work reduction situations. AF1, Tab 9, Subtab 3b, Ex. 20.

positions in work reduction situations when reassignments must be made outside the commuting area[,]" *id.*, and that such reassignments "will be taken when work reductions are anticipated and no placement opportunities exist within the commuting area." *Id.* at 3. Agency guidance elsewhere confirms that "the work reduction process does not apply when there are vacant same graded positions within the commuting area." AF2, Tab 20, attachment at 20. Directive 4300.1 also provides that an affected employee may request consideration for demotion to a vacant position at a lower grade in the same commuting area, in lieu of accepting the offer of reassignment to a position at the same grade and pay outside the commuting area. AF1, Tab 9, Subtab 3b, Ex. 20 at 2.

¶10 After determining that the agency advertised and filled a GS-5/6/7 MA position during the period from May through June, 2007, the administrative judge concluded that its failure to place the appellant in this position constituted a violation of FSIS Directive 4300.1. ID at 18-20. The administrative judge noted that the appellant had twice applied and been deemed qualified for this advertised position, but had not been selected. ID at 18. The administrative judge concluded that agency officials erroneously believed they could not simply place the appellant in the MA position at the GS-6 level because it had promotion potential to GS-7, when, in fact, "the Board has long held . . . that the promotion potential of a position . . . is irrelevant to the question of promotion because there is no guarantee of such a promotion. . . . Therefore, reassignment at the same grade and pay from a position without promotion potential to one with promotion potential is not a promotion. . . . And, consistently, under RIF regulations, assignment rights for displaced employees are made to positions irrespective of the promotion potential of those positions. . . ." ID at 19 (emphasis in original).

¶11 As a consequence, the administrative judge found that the appellant had been eligible for reassignment to the vacant MA position at the GS-6 level in her commuting area, and that therefore the agency violated its Work Reduction Procedures under FSIS Directive 4300.1 in directing her reassignment to the

GS-6 Secretary position in Illinois. *Id.* The administrative judge further found that, because there had been "no solid or substantial basis in personnel practice or principle for appellant's directed reassignment to Chicago . . . [h]er 'acceptance' of a downgrade in lieu of her wrongful reassignment was, therefore, involuntary, as . . . improperly obtained through a directed reassignment that was not based on bona fide management considerations. . . ." *Id.; see Caveney v. Office of Administration*, 57 M.S.P.R. 667, 670 n.2 (1993) (a resignation or retirement will be deemed involuntary if it was improperly obtained though a directed reassignment that was not based on bona fide management considerations).

¶12 As previously noted, the agency's petition for review takes issue with the administrative judge's characterization of its offer to place the appellant in a GS-6 Secretary position in Illinois as a "directed reassignment." PFR File, Tab 3 at 10. More significantly, however, the agency observes that the administrative judge's finding that it was required to place the appellant in the vacant GS 5/6/7 MA position in Beltsville appears to run counter to the operation of 5 C.F.R. § 335.103, "Agency promotion programs." *Id*. at 11. Specifically, § 335.103(c) provides that "competitive procedures in agency promotion plans apply to all promotions under § 335.102 of this part and to the following actions: . . . (iv) Reassignment or demotion to a position with more promotion potential than a position previously held on a permanent basis in the competitive service (except as permitted by reduction-in-force regulations). . . ."

¶13 As the administrative judge noted, RIF regulations provide that when an employee is released from her competitive level as a result of a RIF, "[t]he promotion potential of [an] offered position is not a consideration in determining [the] employee's right of assignment." 5 C.F.R. § 351.701(a); ID at 19. As the administrative judge also noted, however, the downgrade at issue here was not effected as part of a RIF. ID at 10-11. In any case, we need not decide whether the administrative judge's asserted basis for finding the appellant's downgrade involuntary, *i.e.*, the agency's failure to place the appellant in the vacant GS 5/6/7

MA position, runs counter to 5 C.F.R. § 335.103(c)(iv), given the existence of a more fundamental alternative basis, noted by the administrative judge, for finding that the appellant's downgrade was involuntary.

¶14 As previously set forth, the agency, upon notifying the appellant that her GS-6 MA position had been abolished, effectively offered her the following four options: reassignment to the GS-6 Secretary position in Illinois; downgrade to the GS-5 RMA position in Beltsville; resignation; or retirement. AF1, Tab 9, Subtab 3b, Ex. 14. The agency did not advise the appellant that she could refuse all four options, or what the consequences of such a refusal would be. *Id.* Given that the agency repeatedly characterized its Work Reduction Procedures as a mechanism for avoiding a RIF, the appellant's refusal of the positions offered pursuant to those procedures might have resulted in the appellant's release from her competitive level pursuant to a RIF action. Conversely, the appellant might have been subjected to an adverse action removal for refusing a directed reassignment to the GS-6 Secretary position in Illinois. The agency likewise failed to advise the appellant of her Board appeal rights in the event of either such outcome.

¶15 An agency is required to provide an employee with information that is not only correct in nature, but adequate in scope to allow the employee to make an informed decision. *Miller v. Department of Homeland* Security, 111 M.S.P.R. 325, ¶ 8 (2009), *aff'd*, 361 F. App'x 134 (Fed. Cir. 2010). Where, as here, an employee decision is made with "blinders on," based on misinformation or a lack of information, such a decision is involuntary. *Id.* Accordingly, we find that the appellant's "acceptance" of a downgrade to the GS-5 RMA position was involuntary.[3] Moreover, as the administrative judge further noted, where the Board finds that an employee-initiated action is involuntary, it must be reversed

[3] In light of this finding, the Board need not address the appellant's assertion that her downgrade was rendered involuntary by intolerable working conditions.

by operation of law. *See Baldwin v. Department of Veterans Affairs*, 111 M.S.P.R. 586, ¶ 46 (2009).

¶16 We conclude that the appellant's subsequent resignation was also involuntary. As previously set forth, the administrative judge found that the agency directed the appellant's reassignment to the GS-6 Secretary position in Illinois without a legitimate basis, noting that the Board has found that a resignation obtained through such an improper reassignment, even one which did not immediately precede the resignation, was itself rendered involuntary. ID at 19; s*ee Caveney*, 57 M.S.P.R. at 670 n.2. Having instead concluded that the appellant's decision to accept a downgrade to the GS-5 RMA position was rendered involuntary based on the agency's failure to provide her with her full range of options, we find that her ultimate decision to resign from that position was likewise proximately influenced by this same lack of information.

¶17 As the administrative judge noted, the appellant's immediate supervisor, Leigh Nichols, acknowledged in hearing testimony that the appellant was "very unhappy" and "very upset" about the choices presented in the agency's August 7, 2007 letter. Hearing Transcript at 190; *see* ID at 15. The appellant herself explained that she decided to resign after realizing that she had no hope of regaining her GS-6 grade and that consequently her long agency career had reached a dead-end. AF1, Tab 1 at 6.

¶18 The mere fact that the appellant was faced with unpleasant choices, *i.e.*, that of staying in her downgraded position or resigning, does not, by itself, render her decision to resign involuntary. *See Schultz v. United States Navy*, 810 F.2d 1133, 1136-1137 (Fed. Cir. 1987). Had the appellant been afforded her full range of potential options, however, either at the time of her resignation or a year previously, when she accepted the downgrade, she may well have had entirely different choices to make. While it is not possible to reconstruct, after the fact, whether such alternate outcomes would have been more or less welcome than the ones she ultimately faced, the fact remains that her resignation, like her prior

downgrade, was proximately influenced by the agency's failure to provide her with adequate information regarding the options effecting her employment future. Accordingly, we find that the appellant's resignation was involuntary, and must likewise be reversed as a matter of law.

ORDER

¶19 We ORDER the agency to retroactively cancel the appellant's downgrade from the position of Management Assistant, GS-0344-6 to the position of Resource Management Assistant, GS-0303-5, effective September 16, 2007, and to cancel the appellant's resignation and restore her, retroactive to October 10, 2008. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶20 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶21 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶22 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant

believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶23 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

¶24 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. § § 1201.201, 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Codes, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 77960
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, 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 must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling 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 do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. 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 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's

"Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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

DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
   a. Outside earnings with copies of W2's or statement from employer.
   b. Statement that employee was ready, willing and able to work during the period.
   c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

USDA UNITED STATES DEPARTMENT OF AGRICULTURE

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts**.**

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.

2. The following information must be included on AD-343 for Restoration:

a. Employee name and social security number.
b. Detailed explanation of request.
c. Valid agency accounting.
d. Authorized signature (Table 63)
e. If interest is to be included.
f. Check mailing address.
g. Indicate if case is prior to conversion. Computations must be attached.
h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)

2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.

3. Outside earnings documentation statement from agency.

4. If employee received retirement annuity or unemployment, provide amount and address to return monies.

5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)

6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

a. Must provide same data as in 2, a-g above.
b. Prior to conversion computation must be provided.
c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.