UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 94

Docket No. SF-0752-11-0766-R-2

Mary A. Miller,
Appellant,
v.
Department of the Interior,
Agency,
and
Office of Personnel Management,
Petitioner.

December 6, 2013

Edward H. Passman, Esquire, Washington, D.C., for the appellant.

Chandra R. Postma, Esquire, Anchorage, Alaska, for the agency.

Becky C. Ronayne, Esquire, and Robert J. Girouard, Esquire, Washington, D.C., for the petitioner.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 Pursuant to 5 U.S.C. § 7703(d), the Director of the Office of Personnel Management (OPM) has petitioned the Board to reconsider its May 13, 2013 Opinion and Order in *Miller v. Department of the Interior*, 119 M.S.P.R. 438 (2013), which reversed the agency's action removing the appellant based on a

charge of failure to accept a management-directed geographic reassignment.[1] For the following reasons, we DENY the Director's petition and AFFIRM our previous decision in this case AS MODIFIED by this Opinion and Order.

BACKGROUND

¶2 The appellant was a Superintendent at the Sitka National Historical Park in Alaska before her removal, effective August 6, 2010, based on a charge of "failure to accept a management directed reassignment" to the "newly created" position of Alaska Native Affairs Liaison (Liaison position) in Anchorage, Alaska. Initial Appeal File (IAF), Tab 1 at 4, 7; Tab 3, Subtabs 43, 4h, 4m. She appealed her removal, asserting that she did not meet the minimum qualifications for the Liaison position, and that her removal was "tainted by discrimination" based on her race, sex, and physical disability. IAF, Tab 1 at 5. She also alleged that the action was taken in reprisal for protected equal employment opportunity activity. *Id.* She further asserted that the agency committed harmful error in taking the removal action, that the penalty was unduly harsh, and that her removal did not promote the efficiency of the service. *Id.*

¶3 The administrative judge found that the agency proved by preponderant evidence that its decision to reassign the appellant was based upon legitimate management reasons and that it gave adequate notice to the appellant. IAF, Tab 16, Initial Decision (ID) at 6, 19-20. The administrative judge found that there was no dispute that the appellant declined the management-directed reassignment. ID at 20. The administrative judge further found that the appellant was qualified to perform the duties of the new position. ID at 20-21. The administrative judge found that the appellant failed to meet her burden of proof

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[1] The petition for reconsideration in this case was filed on behalf of former Acting Director of OPM Elaine Kaplan. The United States Senate confirmed, on October 30, 2013, the nomination of Katherine Archuleta to be Director of OPM.

on each of her affirmative defenses and that the penalty was reasonable and promoted the efficiency of the service. ID at 22-30.

¶4 After the appellant petitioned for review of the initial decision, the Board vacated the initial decision, reversed the appellant's removal, and ordered the agency to reinstate her to her position as the Superintendent at the Sitka National Historical Park. *Miller v. Department of the Interior*, 119 M.S.P.R. 331, ¶¶ 1, 4, 10-11 (2013). In so doing, the Board departed from its existing three-step analytical framework for deciding adverse actions based on a refusal to accept a directed reassignment, which involved establishment of a prima facie case and shifting burdens of production, in favor of a single efficiency of the service criterion. *Id.*, ¶¶ 5-6. The Board held that it would weigh all of the evidence and make a finding on the ultimate issue of whether the action promotes the efficiency of the service, that the agency must establish by preponderant evidence that the reassignment was properly ordered due to bona fide management considerations in the interest of promoting the efficiency of the service and in accordance with agency discretion under 5 C.F.R. part 335, and that the factors relevant to the former three-step framework would remain relevant to evaluating the case as a whole. *Id.*, ¶ 7.

¶5 The Board further held that considerations such as whether the reassignment was required because the agency had eliminated or had no need for the appellant's continued performance in her former position, or because the agency needed to address the appellant's performance problems in her former position, were absent in this case. *Id.*, ¶¶ 8-9. Moreover, the Board found that the agency did not prove that the appellant's removal promoted the efficiency of the service because the record and testimony of the agency's witnesses indicated that the appellant was successful in her position, the agency had a high regard for the appellant's performance as Superintendent in Sitka, and the agency's actions caused it to lose an apparently valued and successful employee while creating two vacancies that the agency had to fill after her removal. *Id.*, ¶¶ 9-10.

¶6 The Board subsequently reopened this case, vacated the above decision, and substituted in its place a new Opinion and Order that still vacated the initial decision and reversed the removal action. *Miller*, 119 M.S.P.R. 438, ¶¶ 1-2. The Board again indicated that it would abandon the burden-shifting approach that it had previously applied in these types of cases because that approach did not meaningfully add to the Board's adjudication of an adverse action based on a refusal to accept a directed geographic reassignment. *Id.*, ¶¶ 6-8. Nevertheless, the Board indicated that it would in no way depart from any of the jurisprudential principles otherwise governing its review of an adverse action based on a refusal to accept a geographic reassignment. *Id.*, ¶ 8. The Board held that it would simply weigh all of the evidence and make a finding on the ultimate issue of whether the agency proved by preponderant evidence that the misconduct occurred and that its action promoted the efficiency of the service. *Id.*, ¶ 7.

¶7 The Board found that "the record evidence simply does not support a finding that the agency directed the appellant's geographic reassignment due to bona fide management considerations and that her ensuing removal promoted the efficiency of the service." *Id.*, ¶ 9. The Board held, as it had in its earlier, vacated decision, that the appellant was successful in her Superintendent position, that the agency had a high regard for the appellant's performance as Superintendent in Sitka, and that the agency's actions caused it to lose an apparently valued and successful employee while creating two vacancies that the agency had to fill after her removal. *Id.*, ¶¶ 9, 11. The Board further held that, although the agency presented evidence showing that it had a legitimate reason to create the Alaska Native Affairs Liaison position, it failed to provide a "rational basis" for requiring the appellant to accept the geographic reassignment. *Id.*, ¶ 10. In this regard, the Board held as follows:

> For example, the agency made no showing that the appellant's reassignment was necessary because the Superintendent position had been eliminated or the agency had no need for her continued performance in that position. *Cf. Frey* [*v. Department of Labor*],

> 359 F.3d [1355,] 1358, 1360 [(Fed. Cir. 2004)]. Nor is there any indication that the agency needed to reassign her because of any performance problems in the Superintendent position. *Id.* at 1358. In the same vein, the agency did not proffer any evidence suggesting that the appellant's reassignment to Anchorage was necessary because of a reduction-in-force [RIF] or reorganization. *Cf. Wear* [*v. Department of Agriculture*], 22 M.S.P.R. [597,] 599 [(1984)]. In sum, the agency failed to present any evidence showing that its reasons for directing the appellant's geographic reassignment to Anchorage were bona fide such as to support a finding that her removal for refusing to take the reassignment promoted the efficiency of the service.

Id., ¶ 10. The Board also found that the appellant had submitted sufficient credible evidence to cast doubt on the agency's motivations in effecting her removal, noting that the appellant was not serving in a position with a mobility requirement and that her declination of the Liaison position did not impair the performance of that position's functions, given that the appellant had offered to perform that position's functions while performing her duties as Superintendent at Sitka and that the agency ultimately had no trouble filling the Liaison position. *Id.* The Board held that, under these circumstances, "where the agency has failed to provide any evidence that the appellant's geographic reassignment was necessary and where the ensuing removal action does not appear to be rationally related to the efficiency of the service, we find—consistent with our longstanding precedent—that the agency invoked its discretion to reassign the appellant 'as a veil to effect' her separation." *Id.* (quoting *Ketterer v. Department of Agriculture*, 2 M.S.P.R. 294, 299 n.8 (1980)). The Board concluded that "it did not promote the efficiency of the service to direct the appellant to take the position in Anchorage against her will and to remove her from employment altogether when she declined the position." *Id.*, ¶ 11.

¶8 The Director of OPM has petitioned the Board to reconsider its decision.[2] Petition for Reconsideration (PFR) File, Tab 6. The appellant has responded in opposition to the petition for reconsideration, and the agency has filed a response supporting OPM's petition. PFR File, Tabs 7-8.

ANALYSIS

The Board has not imposed a new requirement that the agency prove that its geographic reassignment was "necessary."

¶9 OPM asserts that the Board has improperly replaced the statutorily prescribed standard for upholding an agency's action with a higher one that requires an agency to demonstrate, to the Board's subjective satisfaction, that its directed reassignments are "necessary." PFR File, Tab 6 at 4, 9. We disagree.

¶10 As quoted above, *supra* ¶ 7, there is language in the Board's decision in *Miller* noting that, as examples of the agency's failure to provide a "rational basis" for requiring the appellant to accept the geographic reassignment, the agency made no showing that the appellant's reassignment was necessary because the Superintendent position had been eliminated or the agency had no need for her continued performance in that position, there was no indication that the agency needed to reassign her because of any performance problems in the Superintendent position, and the agency did not proffer any evidence suggesting that the appellant's reassignment to Anchorage was necessary because of a RIF or reorganization. *Miller*, 119 M.S.P.R. 438, ¶ 10; *see id.* ("[W]here the agency has failed to provide any evidence that the appellant's geographic reassignment was

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[2] The Director of OPM may file a petition for reconsideration of a final decision of the Board if the Director determines that: (1) the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management; and (2) the Board's decision will have a substantial impact on a civil service law, rule, or regulation, or policy directive. *See* 5 U.S.C. § 7703(d); 5 C.F.R. § 1201.119(a). The Board will consider de novo the arguments raised by OPM on petition for reconsideration. *Isabella v. Department of State*, 109 M.S.P.R. 453, ¶ 7 (2008).

necessary and where the ensuing removal action does not appear to be rationally related to the efficiency of the service, we find—consistent with our longstanding precedent—that the agency invoked its discretion to reassign the appellant 'as a veil to effect' her separation.").

¶11 The Board ended this discussion, however, by stating that, "[i]n sum, the agency failed to present any evidence showing that its reasons for directing the appellant's geographic reassignment to Anchorage were bona fide such as to support a finding that her removal for refusing to take the reassignment promoted the efficiency of the service." *Id.* Thus, the emphasis in this case has always been on the agency's failure to show that its reasons for the reassignment were bona fide and that its action promoted the efficiency of the service. *See Miller*, 119 M.S.P.R. 438, ¶¶ 7 ("In all chapter 75 adverse action appeals, the agency must prove by a preponderance of the evidence both that the underlying misconduct occurred and that the action promotes the efficiency of the service. . . . [T]the Board should simply weigh all the evidence and make a finding on the ultimate issue of whether the agency proved by a preponderance of the evidence that the misconduct occurred and that its action promotes the efficiency of the service."), 8 ("The agency must establish by a preponderance of the evidence that the geographic reassignment was properly ordered due to bona fide management considerations in the interest of promoting the efficiency of the service . . . ."), 9 ("[T]he record evidence simply does not support a finding that the agency directed the appellant's geographic reassignment due to bona fide management considerations and that her ensuing removal promoted the efficiency of the service."), 10 ("[T]he agency failed to present any evidence showing that its reasons for directing the appellant's geographic reassignment to Anchorage were bona fide such as to support a finding that her removal for refusing to take the reassignment promoted the efficiency of the service."), 11 ("[I]t did not promote the efficiency of the service to direct the appellant to take the position in Anchorage against her will and to remove her from employment altogether when

she declined the position.”). These findings are entirely consistent with 5 U.S.C. § 7513(a) and 5 C.F.R. § 752.403(a), which provide that an agency may remove an employee “for such cause as will promote the efficiency of the service.” The Board must sustain such a removal if the agency’s action is supported by a preponderance of the evidence. *See* 5 U.S.C. § 7701(c)(1)(B). In any event, the Board has held that an agency must do more than merely establish a rational basis for a geographic reassignment. *Miller*, 119 M.S.P.R. 438, ¶ 8; *see McClelland v. Andrus*, 606 F.2d 1278, 1290 (D.C. Cir. 1979) (“An action supportable on ‘any rational basis’ is not necessarily one that will promote the efficiency of the service.”). Here, the agency not only failed to establish a rational basis for the geographic reassignment, but also failed to show by preponderant evidence that the reassignment was properly ordered due to bona fide management considerations in the interest of promoting the efficiency of the service.

¶12 The Board further emphasized in *Miller* that, although it was abandoning the cumbersome and unnecessary burden-shifting approach, it was in no way departing from any of the jurisprudential principles otherwise governing its review of an adverse action based on a refusal to accept a geographic reassignment. *Miller*, 119 M.S.P.R. 438, ¶ 8. Accordingly, to the extent that some of the language in *Miller* may have suggested that the Board was departing from the statutory standard and the existing jurisprudential principles involved in proving an adverse action based on a refusal to accept a geographic reassignment, we hereby clarify that an agency need not prove that a geographic reassignment is “necessary.” Thus, we modify our decision in *Miller* by finding that the agency in this case failed to provide a “rational basis” for requiring the appellant to accept the geographic reassignment because, for example, it did not show that the Superintendent position had been eliminated or that the agency had no need for her continued performance in that position, there was no indication that the appellant had performance problems in the Superintendent position, and the agency did not proffer any evidence of a RIF or reorganization.

¶13 OPM also asserts that in *LaChance v. Devall*, 178 F.3d 1246 (Fed. Cir. 1999), the court reversed a Board decision in which the Board asserted the power to exercise de novo review of an agency's penalty determination when fewer than all of the charges were sustained. PFR File, Tab 6 at 9. OPM contends that the court characterized the purpose of the Civil Service Reform Act of 1978 as giving agencies greater flexibility to remove or discipline employees who engage in misconduct or whose work performance is unacceptable. *Id.* OPM claims that the court held that the Board may not infringe upon an agency's exclusive domain as workforce manager and amplify the Board's review power into the realm of independent management. *Id.* at 9-10. OPM asserts that the court's analysis in *Devall* concerning an agency's penalty determination applies with equal force to the core agency decision of whether to discipline an employee at all. *Id.* at 10. Thus, OPM claims that, if the Board must defer to an agency's determination that a penalty is for such cause as to promote the efficiency of the service, then it must also defer to the agency's determination that the underlying adverse action was for such cause as to promote the efficiency of the service. *Id.*

¶14 In *Devall*, 178 F.3d at 1251, OPM petitioned the court to review the Board's standard for determining the appropriate penalty due when fewer than all of the agency's charges are sustained. Thus, the focus of the court's decision was on whether the Board had the authority to determine penalties independently when fewer than all agency charges were sustained, and how the Board's mitigation authority should be exercised. *See id.* Nevertheless, the court did recognize that "[w]hether such agency action indeed promotes efficiency of the service is within the province of the Board." *Devall*, 178 F.3d at 1255. As set forth above, the Board in *Miller* applied the same efficiency of the service standard that had been applied by both the Board and the court over the years, but simply abandoned the burden-shifting framework for analysis, a framework that is not set forth in the statute or regulation regarding an adverse action appeal such as this. *Cf.* 5 U.S.C. §§ 7513(d), 7701; 5 C.F.R. § 752.403(a). Thus, we find

that OPM has not shown any error in the Board's interpretation or application of the relevant statutes, regulations, and case law.

The Board is not bound by the burden-shifting approach outlined in *Ketterer*.

¶15 OPM contends that the Board has effectively overruled its decisions in *Ketterer*, 2 M.S.P.R. 294, and *Umshler v. Department of the Interior*, 44 M.S.P.R. 628 (1990), which it asserts are consistent with the meaning of the statutory standard, and instead has adopted a "necessity" standard that is contrary to the court's decision in *Frey v. Department of Labor*, 359 F.3d 1355 (Fed. Cir. 2004), which "endorsed" the Board's approach in *Ketterer* and *Umshler* and "adopt[ed] it as the law of the circuit," and which is binding on the Board. PFR File, Tab 6 at 13-14. In this regard, OPM contends that the Board may only review a directed reassignment to assure itself that the reassignment, which is not appealable, is not a pretext for forcing an employee to retire or quit and that, in these types of cases, illicit motivation is the only means by which an appellant may defeat an otherwise legitimate action. *Id*. at 15.

¶16 As set forth above, we have hereby modified our prior decision in this case to clarify that there is no "necessity" standard and to reiterate that the jurisprudential principles otherwise governing Board review in these types of cases has not changed. In any event, we are not persuaded by OPM's claim that the Board may not abandon the burden-shifting approach set forth in such cases as *Ketterer* and *Umshler* because the court "endorsed" that approach in *Frey*.

¶17 In *Frey*, 359 F.3d at 1357, the court affirmed the Board's decision sustaining a removal for refusing to accept a geographic reassignment. The court first set forth the following analysis:

> Reassignments of federal employees are authorized by regulation. *See* 5 C.F.R. § 335.102 (2000). In that regard, the Board has held that discipline is warranted for refusing to accept a legitimate directed reassignment and that removal is not an unreasonably harsh penalty for such a refusal. *See, e.g.*, *Nalbandian v. Department of the Interior*, 25 M.S.P.R. 691, 695 (1985). However, where a removal action is based on a refusal to accept a directed geographical

> reassignment, the agency must prove by a preponderance of the evidence that its reassignment decision "was bona fide, and based upon legitimate management considerations in the interest of the service." *Umshler* . . ., 44 M.S.P.R. [at] 630 . . . (citing *Ketterer* . . ., 2 M.S.P.R. [at] 298 . . .). "If the employee can demonstrate that the reassignment had no solid or substantial basis in personnel practice or principle, the Board may conclude that it was not a valid discretionary management determination, but was instead either an improper effort to pressure the appellant to retire, or was at least an arbitrary and capricious adverse action." *Id.* (citing *Rayfield v.* [*Department of Agriculture*], 26 M.S.P.R. 244, 246 (1985)). Once it is established or unchallenged that a reassignment was properly ordered in an exercise of agency discretion under 5 C.F.R. part 335, the Board will not review the management considerations underlying that exercise of discretion. *Ketterer*, 2 M.S.P.R. at 299 n.8.

Frey, 359 F.3d at 1357-58; *see id.* at 1360 & n.1 (finding that the above principles were "in accordance with the analysis employed by our predecessor court"). The Board has applied these general principles in adjudicating this case.

¶18 After reviewing the facts involved in the case, the court in *Frey* noted that the Board in *Ketterer* and *Umshler* held that, once a prima facie case supporting the validity of the reassignment is established, the burden of going forward with the evidence would then shift to the employee. *Id.* at 1360. If the employee could show that the reassignment had no solid or substantial basis in personnel practice or principle, the Board could conclude that the reassignment was not a valid exercise of managerial discretion, but was instead either an improper effort to pressure the appellant to retire or was at least an arbitrary and capricious action. *Id.* The court then held, "[w]e endorse the Board's approach in these cases, as set forth above, and adopt it as the law of the circuit." *Id.*

¶19 It is unclear whether the court, in endorsing and adopting the Board's approach "as set forth above," was referring to the more general principles set forth in the block quotation above, the burden-shifting framework, or both. To the extent that the court was referring to the former, we have applied that approach in this case. In fact, when it applied the above principles in the case

before it, the court in *Frey* found that substantial evidence fully supported the Board's conclusion that the agency established a bona fide, legitimate management reason for Mr. Frey's geographical reassignment. *Id.* at 1360. The court also found that Mr. Frey's argument that the agency did not establish the legitimacy of his reassignment was essentially an unsuccessful attack on the administrative judge's credibility determinations. *Id.* at 1360-61. Thus, the court simply upheld the fact finder's determination that there was a bona fide, legitimate management reason for the geographical reassignment and found that Mr. Frey did not provide any basis to undermine such a finding. The process used by the court in *Frey* to adjudicate the case is fundamentally the same as that used by the Board here, where we have found that the agency *did not* establish a bona fide, legitimate management reason for the appellant's geographical reassignment and that the agency instead invoked its discretion to reassign the appellant as a "veil" to effect her separation. *See Miller*, 119 M.S.P.R. 438, ¶¶ 9-11. As explained in *Miller*, 119 M.S.P.R. 438, ¶ 7, the burden-shifting apparatus is irrelevant once the record is complete, and the ultimate issue is whether the agency proved by preponderant evidence that the misconduct occurred and that its action promoted the efficiency of the service. Thus, our abandonment of the burden-shifting framework is entirely consistent with the approach taken by the court in *Frey*.

¶20 In any event, we find that the court's decision in *Frey* was not a de novo interpretation of any statute applicable in that case. Rather, the court in *Frey* held that the Board's manner of adjudicating the case was reasonable and therefore deferred to the Board. *See Frey*, 359 F.3d at 1360; *cf. Tunik v. Merit Systems Protection Board*, 407 F.3d 1326, 1336-38 (Fed. Cir. 2005) (finding that the court had deferred, in two prior decisions, to the Board's interpretation of 5 U.S.C. § 7521). In this regard, we note that, under 5 U.S.C. § 1204(a)(1), the Board shall "adjudicate" all matters within its jurisdiction and take final action on any such matter. When, as here, the Board applies a standard of proof that is

consistent with the applicable statute, regulation, and case law, the Board may determine the manner in which it adjudicates the appeal, especially when any change in the manner of adjudication involves only the abandonment of an evidentiary burden-shifting approach in a case in which the record is complete. *Cf. Dick v. Department of Veterans Affairs*, 290 F.3d 1356, 1363-64 (Fed. Cir. 2002) (the Board has great discretion to determine which issues to consider first), *overruled on other grounds by Garcia v. Department of Homeland Security*, 437 F.3d 1322 (Fed. Cir. 2006) (en banc); *Wingate v. U.S. Postal Service*, 118 M.S.P.R. 566, ¶ 4 (2012) (eschewing the *McDonnell Douglas* burden-shifting analysis when discrimination was alleged and the record was complete); *Bommer v. Department of the Navy*, 34 M.S.P.R. 543, 547 n.7 (1987) (although OPM has the authority to create a right of appeal to the Board and to abolish the right it has created, it has no authority to regulate the manner in which the Board adjudicates appeals).

¶21 When an earlier panel decision is based on deference to an agency's statutory interpretation, a later panel is free to consider whether a new agency interpretation is reasonable without en banc reconsideration of the earlier panel decision. *See Tunik*, 407 F.3d at 1338. Because we find that the decision in *Frey* was based on the court's deference to the Board, the Board is not bound to apply the burden-shifting framework in the same manner as that framework appeared to have been applied in *Frey*. *See id.* at 1338-39, 1341. Moreover, there has been no codification of the burden-shifting framework in the Board's regulations so as to preclude a change in approach by the Board. *See id.* at 1341-46.[3]

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[3] The burden-shifting approach in *Ketterer* that OPM contends is superior to the single-standard analysis that we adopted in this case led to the same result as the one we reached in this case, on similar facts. In *Ketterer*, as in this case, the agency removed an employee for declining a directed geographic reassignment, even though the employee was performing satisfactorily prior to his removal and the agency did not abolish the position from which he was removed. 2 M.S.P.R. at 297-98. In *Ketterer*, as

¶22 OPM also questions the Board's determination that the removal did not promote the efficiency of the service because the agency lost a valuable and successful employee and created two vacancies that needed to be filled. PFR File, Tab 6 at 10. OPM argues that the Board's determination reflects an exceedingly narrow understanding of the meaning of the term "efficiency of the service" because it equates the term with "productive efficiency or the efficient allocation of resources," rather than with a broader range of circumstances that are not limited to successful performance and economical administration. *Id.* at 10-12. OPM contends that there is no more fundamental management right than the right for an agency to deploy its employees in what it deems to be an efficient and effective manner. *Id.* at 12.

¶23 As set forth above, our determination in this case is not based solely upon the agency's loss of a valuable employee and the creation of two vacancies that needed to be filled. Rather, the agency failed to establish by preponderant evidence that the geographic reassignment was properly ordered due to bona fide management considerations in the interest of promoting the efficiency of the service. While agencies have the authority under 5 C.F.R. § 335.102 to reassign their employees, any adverse action based on a failure to accept a geographic reassignment must meet the efficiency of the service standard. *See Frey*, 359 F.3d at 1357-58, 1360; *Miller*, 119 M.S.P.R. 438, ¶¶ 6-10.

¶24 OPM contends that there was an abundance of legitimate management reasons for the appellant's directed reassignment, including the determination of her direct supervisor and the regional director that she was the best candidate for the position among a pool of candidates from the staff and management's assessment that she had the strongest skills for the position, including experience

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in this case, the Board concluded that removal did not promote the efficiency of the service. *Id.* at 300.

working as a liaison with native communities, personal relationships with the superintendents from other parks in the state, an understanding of parks operations, and her successful modeling of what the agency wanted to accomplish in the new position. PFR File, Tab 6 at 15. The Board recognized in *Miller*, 119 M.S.P.R. 438, ¶ 11, that agency witnesses testified that the agency relied upon the appellant's strengths and accomplishments as a Superintendent as the basis for directing her reassignment to the Liaison position in Anchorage, over 500 miles away. Nevertheless, we further found that the agency did not show that its reasons for the directed geographic reassignment were bona fide and that the agency instead invoked its discretion to reassign the appellant as a "veil" to effect her separation. *Miller*, 119 M.S.P.R. 438, ¶¶ 10-11.[4]

ORDER

¶25 Accordingly, and upon reconsideration, the Board's final decision in *Miller*, 119 M.S.P.R. 438, is AFFIRMED as MODIFIED by this Opinion and

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[4] OPM contends that the Board's prior decision in this case robs agencies of the flexibility they need in times of tight budgets to "geographically transfer personnel from underfunded to funded activities." In the present case, however, there is no indication that the agency reassigned the appellant from Sitka to Anchorage as part of an effort to move her from an underfunded activity to a funded activity. Rather, the agency created a *new* position in Anchorage *and* filled the appellant's position in Sitka after it removed her from it. *Miller*, 119 M.S.P.R. 438, ¶ 9. How application of the single efficiency of the service standard would play out when an employee was removed for declining a directed reassignment that was part of an agency's drive to economize is not before the Board in this case, and, accordingly, that hypothetical concern provides no basis for modifying the Board's earlier decision herein. *Cf. Chandler v. Department of the Treasury*, 120 M.S.P.R. 163, ¶¶ 7-9 (2013) (a majority of the Board held that an agency has broad discretion in deciding how to cope with budgetary shortfalls; the Board's review of a furlough under the efficiency of the service standard generally does not encompass agency spending decisions on personnel matters, but instead focuses on whether the furlough was imposed in a uniform and consistent manner and whether any differential treatment of employees was justified by a legitimate management reason).

Order. The Director may seek judicial review of the Board's final decision in the U.S. Court of Appeals for the Federal Circuit. 5 U.S.C. § 7703(d).

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 review of this final decision on your discrimination claims by the Equal Employment Opportunity Commission (EEOC). *See* Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). If you submit your request by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit your request via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, NE
Suite 5SW12G
Washington, D.C. 20507

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. § 2000e-5(f) and 29 U.S.C. § 794a.

FOR THE BOARD:

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