

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KENNETH L. COOPER : CIVIL ACTION
: :
v. : :
: :
DR. DONALD C. WINTER, :
Secretary, Department of :
the Navy : NO. 06-1619

MEMORANDUM AND ORDER

McLaughlin, J.

December 18, 2007

This case is an appeal from a decision of the Merit Systems Protection Board ("MSPB"). The plaintiff, a Navy employee, filed a complaint with the MSPB alleging that the Navy had unlawfully subjected him to a Reduction in Force ("RIF") and had carried out the RIF in a racially discriminatory way, treating certain white employees better than the plaintiff, who is black. Administrative Law Judge ("ALJ") Michael H. Garrety denied the plaintiff's claims on October 24, 2005. Cooper v. Dep't of the Navy, Decision of Michael H. Garrety, Oct. 24, 2005, Gov. Ex. 5, at 855-70 [hereinafter Garrety Decision].¹ A panel of the MSPB denied the plaintiff's petition for review on March 16, 2006, stating in a brief order that there was no new evidence

¹ This and other references to "Gov. Ex.," with the exception of Gov. Ex. 1, denote the bates-stamped MSPB Administrative Record that the parties jointly filed pursuant to a joint stipulation (Docket No. 13). For ease of reference, the pages listed are the bates-stamped pages, where applicable.

in the case and that the administrative judge did not make any errors of law. Cooper v. Dep't of the Navy, Decision of the MSPB, Mar. 16, 2006, Gov. Ex. 6, at 1107-13. The plaintiff filed the instant action on April 18, 2006.

The Navy filed a motion for summary judgment on both the racial discrimination claim and the unlawful personnel action claim on August 31, 2007. In response, the plaintiff filed a motion for summary judgment on the unlawful personnel action claim on September 18, 2007. As plaintiff's counsel confirmed at oral argument, the plaintiff does not oppose the Navy's motion as to the racial discrimination claim. Oral Arg. Tr. 5, Dec. 5, 2007. Therefore, the Court will grant that portion of the motion.

As discussed below, this Court reviews the MSPB's factual findings deferentially and reviews its legal determinations de novo. Applying these standards, the Court will grant the defendant's motion and deny the plaintiff's motion.

I. Facts

The following facts are undisputed. The plaintiff was employed by the Navy at the Naval Ship Systems Engineering Station ("NAVSSSES") in Philadelphia. In October 2003, the plaintiff and 13 other workers at NAVSSSES were reassigned to the Public Works Center, Norfolk Detachment ("PWC Norfolk"), also in Philadelphia. PWC Norfolk was then in the middle of a Commercial

Activities Study ("CAS"), in which the center's work and staffing was undergoing review. As part of the CAS, PWC Norfolk had to submit a bid to perform services for the Navy. That bid would compete with bids from private service providers. PWC Norfolk's bid was unopposed, and so it won the work. However, as a condition of its win, it had to reduce its workforce, in accordance with its Most Efficient Organization ("MEO") document. As a result, PWC Norfolk underwent a Reduction in Force ("RIF"). When the plaintiff moved to PWC Norwalk, the analysis of positions for the RIF was already underway. Although it had initially thought that it might be able to keep all 14 new positions, NAVSSES promised only that it would maintain those positions for one year. Gov. Ex. 2, at 153; Gov. Ex. 3, at 488; Id. at 583; Gov. Ex. 7, at 16; Id. at 19-20; Id. at 51-53, 59; Gov. Ex. 3, at 583; Gov. Ex. 7, at 189-90, 195, 202; Garrety Decision at 859-60.

Ultimately, PWC Norfolk determined that it could retain only nine of the 14 new positions, and it added those 14 positions to the RIF analysis. The plaintiff was one of the employees who was given the choice of either accepting a lower grade or resigning. In the fall of 2004, the plaintiff was reduced from a Wood Craftsman, WG-4605, Grade 10, to a Carpentry Worker, WG-4607, Grade 7, a decrease of three grades lower. He did not suffer a salary decrease, but starting two years after his reassignment, he received only 50% of any future cost-of-

living increases. Gov. Ex. 7, at 173-75, 196, 229, 236, 239; Gov. Ex. 2, at 290-91; Gov. Ex. 8, at 15-16; Gov. Ex. 1, at ¶ 4.

When several employees' positions are abolished through an RIF, a computer program is run to figure out the best position available at or below each employee's current grade. Employees receive priority on the basis of a number of factors, including veteran status and how long they have been working for the Navy.² Id. at ¶ 3; Gov. Ex. 8, at 8-12.

II. Standard of Review

In reviewing the ALJ's decision, this Court may consider only the administrative record. See, e.g., Romero v. Dep't of the Army, 708 F.2d 1561, 1563 (10th Cir. 1983). This Court must affirm the ALJ's decision unless it is:

- (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (2) obtained without procedures required by law, rule, or regulation having been followed; or
- (3) unsupported by substantial evidence.

5 U.S.C. § 7703(c) (2000). "To determine if the decision is supported by substantial evidence, courts inquire whether the decision is supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. While the

² The plaintiff raised several additional factual issues in his motion and at oral argument. Pl.'s Br. 3-7. However, because the Court finds that the MSPB correctly found a lack of jurisdiction over the claims to which those facts are relevant, the Court will not address those facts.

evidence need not be unequivocal, there must be more than a mere scintilla of evidence which must reasonably support the MSPB's findings." Cohen v. Austin, 861 F. Supp. 340, 342-43 (E.D. Pa. 1994) (internal quotations omitted). Under the first prong of this test, questions of law - including whether the MSPB had jurisdiction to hear certain portions of the plaintiff's case - are subject to de novo review. Carley v. Dep't of the Army, 413 F.3d 1354, 1356 (Fed. Cir. 2005). However, the civil servant challenging the agency's action before the MSPB bears the burden of proving the factual predicates for jurisdiction. 5 C.F.R. § 1201.56(a)(2)(i) (2007).

On a motion for summary judgment, a court must view the evidence and draw reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. See, e.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Summary judgment is proper if the pleadings and other evidence on the record "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

III. Analysis

The Court will treat the plaintiff's own motion for summary judgment as his opposition to the defendant's motion, since the plaintiff did not file a separate opposition. The

plaintiff argues that the Navy acted unlawfully and fraudulently in transferring him from NAVSSES, which had no CAS pending, to PWC Norfolk, which did. He further argues that the Navy acted unlawfully in including him in the RIF even though he was not present at PWC Norfolk when the latter first evaluated which positions should be eliminated in the RIF.

As to the plaintiff's first argument, the ALJ ruled that he did not have jurisdiction to hear that claim. As to the plaintiff's second argument, the ALJ ruled that the Navy had acted within its discretion in including Mr. Cooper in the RIF and had conducted the RIF properly. The Court will consider each component of the plaintiff's claim in turn.

A. The Plaintiff's Transfer

Judge Garrety found that the plaintiff's initial transfer from NAVSSES to PWC Norfolk was not reviewable. Garrety Decision at 860-61. This Court will affirm the ALJ's decision that the MSPB lacked jurisdiction over the plaintiff's claim that his transfer was improper.

The MSPB has jurisdiction only over actions that have been made appealable "under any law, rule, or regulation." 5 U.S.C. § 7701(a) (2000). Under the pertinent regulation, "[a]n employee who has been furloughed for more than 30 days, separated, or demoted by a reduction in force action may appeal

to the Merit Systems Protection Board." 5 C.F.R. § 351.901. Unless the challenged personnel action falls under one of these categories, the MSPB lacks jurisdiction. Wolf v. Department of Veterans Affairs, 317 F.3d 1395, 1396-97 (Fed. Cir. 2003). Reassignment or transfer without a demotion does not confer jurisdiction. Carley, 413 F.3d at 1357 ("We have held as a general proposition that reassignment or transfer, absent an underlying action over which the Board has jurisdiction, does not provide the Board with jurisdiction.").

The cases the plaintiff cites are unavailing. He argues that "agency reorganization actions, even separated in time by years, can still be deemed to be part of a seamless reduction in force action." Pl.'s Br. 8 (citing Barry v. Fed. Labor Relations Auth., 74 M.S.P.R. 164 (1997); Sheifer v. Dep't of Labor, 39 M.S.P.R. 34 (1988); McClure v. Fed. Emergency Mgmt. Agency, 32 M.S.P.R. 672 (1987)). Both Barry and Sheifer concern adverse personnel actions that occurred after an RIF and that the employee argued had occurred as a belated result of the RIF. In both cases, the MSPB remanded to the ALJ for further factual findings to determine whether jurisdiction existed. Barry, 74 M.S.P.R. at 169-71; Sheifer, 39 M.S.P.R. at 37-38.

McClure, on the other hand, bears facial resemblance to the instant situation but is distinguishable. In McClure, the employee had previously occupied a GS-13 position. The agency reassigned him to another GS-13 position that the agency knew did

not merit GS-13 classification and that was, at the time of reassignment, already scheduled to be downgraded to become a GS-12 position. After that new position was in fact downgraded to GS-12, the agency conducted an RIF in which the employee was placed in a different GS-12 position. McClure, 32 M.S.P.R. at 674-75. The MSPB found that by reassigning the employee to a GS-13 position that the agency knew would soon become a GS-12 position, the agency had improperly circumvented the RIF regulations. The MSPB therefore found that that change constituted a demotion that should have been subject to RIF procedures and that therefore the outcome of the second RIF was tainted. Id. at 675-76.

The instant situation is different. The plaintiff was moved from one Navy entity to another without any change in grade or position. The plaintiff has pointed to no evidence that the Navy knew at the time it transferred him to PWC Norfolk that his particular position was already slated to be downgraded because it had been improperly classified. The McClure plaintiff's injury was having to enter the RIF in a GS-12 position rather than in a GS-13 position; here, the plaintiff entered the PWC Norfolk RIF at the same Grade 10 level that he had held while employed by NAVSSES.

B. The Plaintiff's Inclusion in the RIF

Having determined that the MSPB properly found that it lacked jurisdiction to review the process by which Mr. Cooper was moved to NAVSSES, the Court proceeds to the question of whether the Navy was within its discretion in including Mr. Cooper in the RIF. Here, the Court reviews the MSPB's findings for whether they were arbitrary and capricious or unsupported by substantial evidence.

The Court finds that the MSPB's findings were not arbitrary and capricious and were supported by substantial evidence. As Judge Garrety noted, the plaintiff does not cite any law or authority for the proposition that it was improper for the Navy to include positions in the RIF that had not been part of the initial CAS. Garrety Decision at 861. This Court repeatedly asked plaintiff's counsel at oral argument for any such legal authority but received no response on point. See Oral Arg. Tr. 17-23. Judge Garrety further found that the Navy had made a showing that it conducted the RIF procedures properly and within its discretion. Garrety Decision at 861-63 ("The [MSPB] does not second-guess the exercise of managerial discretion involved in such decisions."). Once the agency shows that the decision to have an RIF was based on permissible reasons, "the [MSPB] has no authority to review the management considerations that underlie the agency's exercise of its discretion. The agency, not the Board, is responsible for deciding whether to retain or abolish particular positions." Holmes v. Dep't of

Army, 41 M.S.P.R. 612, 614-15 (1989), aff'd 914 F.2d 271 (Fed. Cir. 1990). The plaintiff's statement, without citation to the record, that the Navy's proffered explanations for its actions were discredited does not meet the high burden of showing that the MSPB's decision was arbitrary and capricious or without substantial evidence. Pl.'s Br. 12-14.

An appropriate Order follows.

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ORDER

AND NOW, this 18th day of December, 2007, upon consideration of the defendant's Motion for Summary Judgment (Docket No. 14), the plaintiff's Motion for Summary Judgment (Docket No. 19), and the defendant's opposition to the plaintiff's motion, and after oral argument on December 5, 2007, IT IS HEREBY ORDERED that the defendant's motion is GRANTED, and the plaintiff's motion is DENIED.

Judgment is entered for the defendant and against the plaintiff. This case is closed.

BY THE COURT:

/s/ Mary A. McLaughlin
MARY A. McLAUGHLIN, J.