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MSPB Initial Decisions (MSPI)

WALDO, RICHARD VS USAF

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ALJ: Armstrong, Sherry A.

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

RICHARD J WALDO, Appellant, v. DEPARTMENT OF THE AIR FORCE, Agency.	DOCKET NUMBER DC-0752-01-0274-I-1 DATE: August 7, 2001

Richard J Waldo, Germany, pro se.

Capt. Thomas M. Rodrigues, Esquire, Germany, for the agency.

BEFORE

Sherry A. Armstrong
Administrative Judge

INITIAL DECISION

INTRODUCTION

On February 7, 2001, the appellant filed a timely appeal of the agency's action removing him from Federal employment effective January 13, 2001. Agency File (Ag. File), Tab 4A. The Board has jurisdiction over this appeal. *See* 5 U.S.C. §§ 7511-7513. For the reasons set forth below, the agency's action is AFFIRMED.

BACKGROUND

The following information is undisputed. In June of 1991, the appellant was appointed to the position of Management Assistant, GS-0344-07, at RAF Mildenhall in Germany. On June 3, 1991, he signed an ◄**overseas**► employment ◄**agreement**► which

stated that his ◄**overseas**► appointment was subject to the Department of Defense (DOD) ◄**rotation**► policy and, accordingly, that it was limited to a term of five (5) years. Ag. File, Tab 4P. The ◄**agreement**► stated that, at the conclusion of 5 years, the appellant would be terminated unless an extension was granted. *Id.* The appellant acknowledged that he understood and accepted the conditions stated in the ◄**agreement**►. *Id.* On July 18, 1998, the agency and the appellant signed a "Memorandum of Understanding and ◄**Agreement**►" whereby the parties agreed to a two-year extension of the appellant's tour of duty based on the requirements specified in the ◄**agreement**►. Appeal File (AF), Tab 1, Exhibit 4. The ◄**agreement**► specified that the extension would not exceed July 18, 2000. *Id.* On November 29, 1999, the appellant inquired regarding a further extension and was informed and his conversion in July of 1998 was for the purpose of giving him Priority Placement Program (PPP) eligibility for a return assignment to the United States.1 Ag. File, Tab 4N. The information provided to the appellant informed him that his acceptance of the appointment was with the understanding that at the end of the additional tour extension he would register for the PPP. *Id.*

On February 14, 2000, the agency advised the appellant in writing that his tour would expire on July 18, 2000, and informed him of the requirement to enroll in the DOD PPP. Ag. File, Tab 4M. The agency further notified the appellant that failure to request and accept return assignment may result in his separation from employment. *Id.* The appellant acknowledged receipt of this document. *Id.* He subsequently enrolled in the PPP on February 16, 2000. Ag. File, Tab 4K. However, on June 19, 2000, he requested that his registration in the PPP be canceled because, at the time of his registration, he was unaware of alleged requirements that the terms and conditions of his employment had to be contained in his employment ◄**agreement**►. AF, Tab 23, Attachments 7 and 8. The agency declined the appellant's request on the grounds that PPP registration was mandatory. *Id.* at Attachment 8.

On August 11, 2000, in accordance with the PPP, the appellant was offered the position of Program Analyst, GS-0343-09, in the United States. Ag. File, Tab 4F. The appellant declined the position. *Id.* On November 30, 2000, the agency proposed the appellant's ◄**removal**► for failure to accept a valid position offered to him pursuant to the terms of his original ◄**overseas**► employment ◄**agreement**►. Ag. File, Tab 4E. The appellant filed a written reply. Ag. File, Tab 4D. On January 10, 2001, the agency determined that the appellant's ◄**removal**► was warranted and supported the efficiency of the service. Ag. File, Tab 4B. The appellant was removed effective January 13, 2001. Ag. File, Tab 4A.

In his appeal, the appellant contends that the agency's action must be reversed because of various allegations of violations of law and harmful procedural error. AF, Tabs 1, 23, and 24. He further contends that the penalty of ◄**removal**► was unwarranted and does not support the efficiency of the service. *Id.* The agency disputes the appellant's assertions and argues that its action should be upheld. AF, Tabs 5 and 25. Because the appellant withdrew his request for a hearing, AF, Tab 14, this appeal was decided on the written record.

ANALYSIS AND FINDINGS

The agency must prove the charges contained in the proposal notice by preponderant evidence. 5 U.S.C. § 7701(c); 5 C.F.R. §

1201.56(a)(1)(ii). Preponderant evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c)(2). The agency must also demonstrate that disciplinary action will promote the efficiency of the service, *see Kruger v. Department of Justice*, 32 M.S.P.R. 71, 73-74 (1987), and that the penalty imposed was reasonable. *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981).

The agency has proven its charge by preponderant evidence.

The record shows that the appellant entered into a **◄rotation►** **◄agreement►** with the agency on June 3, 1991. Ag. File, Tab 4P. As noted above, the **◄agreement►** expressly provided that the appellant's **◄overseas►** appointment was subject to the **◄rotation►** policy, that it was limited to a term of 5 years, and that the appellant would be terminated at the expiration of that period unless an extension was granted. *Id.* An extension was granted on July 18, 1998. AF, Tab 1, Exhibit 4. The extension **◄agreement►** specified that the extension would not exceed July 18, 2000. *Id.* The agency subsequently advised the appellant of the requirement to enroll in the PPP on February 14, 2000, and informed him that failure to request and accept return assignment may result in his separation from employment. Ag. File, Tab 4M. The appellant subsequently enrolled in the PPP on February 16, 2000, but declined a valid job offer to a permanent, full-time position in the United States to commence after his **◄overseas►** tour of duty expired. Ag. File, Tabs 4F and 4K.

I note that the appellant argues that the initial **◄agreement►** is irrelevant to this appeal based on his allegation that the **◄agreement►** was for a non-career, 5 year term appointment, and the terms and conditions applied only to his tenure as an **◄overseas►** limited employee. *Id.* I find no merit to the appellant's arguments. The July 1998 **◄agreement►** clearly indicated it was an "extension" of the appellant's initial **◄overseas►** appointment and, by definition, implies that the terms of the original **◄agreement►** would remain in effect. Further, as the issue is one of notice, it is my determination that the initial employment **◄agreement►** may be used to establish any requisite notice. *Cf. Soper v. United States,* 677 F.2d 869, 872 (Ct.Cl. 1982) (The purpose of a **◄rotation►**al **◄agreement►** is to provide notice to an employee of restrictions on his employment and the employee's refusal to sign his latest **◄rotation►**al **◄agreement►** was deemed irrelevant as the employee was on notice from prior **◄rotation►**al **◄agreement►** of such restrictions).

Even if that **◄agreement►** was not considered, however, the July 18, 2000 memorandum specifically informed the appellant that the two-year extension was an exception to the 5 year **◄rotation►** policy and that the extension would not exceed July 18, 2000. AF, Tab 1, Exhibit 4. Thus, the appellant was clearly on notice that he was still subject to the **◄rotation►** policy and, thus, that restrictions on his tenure in the **◄overseas►** position existed.

Accordingly, I find that the agency has proven by preponderant evidence that the appellant was subject to the DOD's **◄rotation►** policy and that he failed to accept a valid DOD PPP job offer after the expiration of his **◄overseas►** tour of duty. Thus, the agency's charge is sustained.

The appellant failed to establish his affirmative defenses by preponderant evidence.

In his appeal, the appellant raised the affirmative defenses of harmful procedural error and violations of law which he contends warrants reversal of the agency's action. AF, Tabs 1, 23, and 24. As the appellant was advised, AF, Tab 18, he must prove his affirmative defenses by preponderant evidence. *See* 5 C.F.R. § 1201.56(c)(3). To establish harmful procedural error, he must prove that the agency committed an error in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. *See, e.g., Bowden v. Department of the Army*, 59 M.S.P.R. 662 (1993). The burden is upon the appellant to establish that the agency committed an error and that the error was harmful, i.e., that it caused substantial prejudice to his rights. *Id.* To establish an affirmative defense of violation of law, the appellant must establish that an agency action was not in accordance with law. *See Stephen v. Department of the Air Force*, 47 M.S.P.R. 672 (1991).

The appellant's allegations largely concern the agency's alleged lack of written notice of the specific requirements of the DOD **◄rotation►** policy and the PPP. The appellant cited various agency regulations and other documents which he argues mandate written notice of the **◄rotation►** policy with the PPP requirements in his employment **◄agreement►** for the position he occupied at the time of separation. AF, Tabs 1, 23 and 24. I have considered all of the arguments raised by the appellant. In sum, it is the appellant's contention that the agency was required to specifically delineate the terms and conditions of the **◄rotation►** policy, with express notice of the PPP requirements, in his signed employment **◄agreement►** and, if it failed to do so, he was entitled to an automatic extension of his tour of duty for two years. *Id.*

I note at the outset that the appellant does not dispute that he was fully aware of the agency's **◄rotation►** policy which mandates a 5 year limit for **◄overseas►** appointments. AF, Tabs 1, 23, and 24. While he does not expressly concede such knowledge, he did not disavow knowledge either. In fact, the appellant stated that "mere knowledge" of the **◄rotation►** program in the absence of the required terms and conditions of PPP in an employment **◄agreement►** was not sufficient. AF, Tab 24. Thus, in addition to written notice, it appears clear that the appellant had actual notice of the agency's **◄rotation►** policy.

The appellant cited several agency regulations addressing employment **◄agreement►**s for employees hired or converted to career or career-conditional appointments. AF, Tabs 23 and 24. For instance, the appellant cites to the DOD Civilian Personnel Manual, Section 1400.25-M, dated August 24, 1988, which provides that such employees "shall be required to sign an **◄agreement►** as a condition of employment specifying that they will register in the DOD [PPP] and accept assignment in the United States when offered. ... Failure or refusal to register in the DOD [PPP] or to accept an appropriate offer would be a basis for separation." AF, Tab 24, Attachment 1 (page 3). The appellant cited several other agency provisions which reference the terms of the **◄overseas►** employment **◄agreement►** as grounds for his argument that the regulations require express language in his employment **◄agreement►** regarding the employee's obligations under the PPP and the consequences of any failure to comply with those requirements. AF, Tab 24. I have reviewed all of the provisions cited by the appellant. Moreover, the appellant provided documentation regarding appointments for two other employees whereby the agency specifically delineated that the employees had to sign statements expressly providing that they did not have PPP rights or that they had to register in the DOD

PPP for return placement to the United States or face separation. AF, Tab 24, Attachment 4.

While express language regarding the PPP was not contained in the agency's employment ◄**agreement**►s with the appellant, the ◄**agreement**►s did reference the ◄**rotation**► policy. Ag. File, Tab 4P. AF, Tab 1, Exhibit 4. Assuming that express language regarding the PPP was required, it is undisputed that the ◄**agreement**►s between the appellant and the agency do not specify this language regarding the PPP and it is clear that the agency could have done so. However, the issue is whether such an error would constitute harmful procedural error. Other than his argument that he was entitled to a two year extension of his tour of duty, an argument which is discussed below, the appellant does not specify any way the outcome of agency's action would have been different had the express language been included. In fact, based on the express language of the extension ◄**agreement**►, the appellant's term of employment would have concluded on July 18, 2000, and the appellant would have been separated. If express language regarding the PPP had been included, the result would have been the same as the appellant would have either accepted a PPP position or been subjected to termination. As discussed at length above, the appellant was offered a PPP position, rejected it, and was separated. Moreover, contrary to the appellant's arguments that he was unaware of the PPP until February of 2000, the appellant was expressly advised of the PPP at the latest in November of 1999. Ag. File, Tab 4N. He was subsequently provided with PPP rights and a valid job offer which he declined. Therefore, the outcome before the agency, which was separation, was the same.

The appellant further argues that the agency committed a harmful procedural error when it declined to cancel his enrollment in the PPP. AF, Tab 24. It is undisputed that the appellant made such a request which the agency denied based on its determination that registration was mandatory. AF, Tab 23, Attachments 7 and 8. It is not necessary to resolve this contention because, even if the agency was required to act on the appellant's request, the appellant failed to demonstrate how the outcome would have been different. Absent valid grounds for an extension or another position abroad or in the United States, the appellant would have been removed pursuant to the ◄**rotation**► policy if he was not granted a position under the PPP.

As referenced above, the appellant argues that, because the agency failed to delineate the express requirements of the PPP in his employment ◄**agreement**►, it was required to afford him an extension of two years. AF, Tab 24. As grounds for his argument, the appellant cites the agency's regulations at subchapter 4, "Foreign Area Employment Limitation." AF, Tab 23, Attachment 3. This chapter of the Air Force Supplement to the Federal Personnel Manual states in section 4-1 that the ◄**rotation**► program limits the period of authorized foreign area employment to a period of 5 years unless exempted from the policy. *Id.* It notes that employees subject to the ◄**rotation**► policy may exercise return rights if applicable or may receive placement assistance through the PPP. *Id.* It is undisputed that the appellant was informed that he did not have return rights. AF, Tab 1, Exhibit 4. However, as discussed herein, he was entitled to the benefits of the PPP.

The first provision cited by the appellant, section 4-2(a) and (b), state that an employee under a career appointment "will be required to sign an ◄**overseas**► employment ◄**agreement**► which establishes the conditions and entitlements related to such assignment. ... Failure to obtain the required ◄**agreement**► due to an administrative oversight does not serve to exempt an employee from the DOD ◄**rotation**► program." AF, Tab 23, Attachment 3. The following section, section 4-3, "Computing

Allowable Employment Period," provides that, for the employee who has less than two years remaining on their appointment and was not given an ◄**overseas**► employment ◄**agreement**►, the employee's return date will be projected to be two years from the date written notification was given. *Id.* Consequently, the appellant argues that his term of employment should have been extended by two years. AF, Tab 24.

I find no merit to the appellant's argument. First, he did receive an ◄**overseas**► employment ◄**agreement**► as required by the subchapter cited. AF, Tab 23, Attachment 3. While the two ◄**agreement**►s signed by the appellant could have provided more detailed information regarding the PPP as done for other employees, this subchapter does not require that the ◄**overseas**► employment ◄**agreement**► contain specific language regarding the PPP. *Id.* Rather, it requires that an agency advise an employee that they are subject to the ◄**rotation**► policy. *Id.* As noted above, both ◄**agreement**►s signed by the appellant specifically and expressly delineated limitations in his terms of employment in the ◄**overseas**► position and indicated that the appellant was subject to the ◄**rotation**► policy. Ag. File, Tab 4P; AF, Tab 1, Exhibit 4. The appellant was well aware, both in actual notice which he does not deny as well as in written notice, that he could not remain in an ◄**overseas**► position for an indefinite period of time. Consequently, I find that he was not entitled to a two year extension in this case.

Finally, the appellant argues that the agency had obviously predetermined that his ◄**removal**► was warranted when the agency hired a replacement for his position prior to issuance of a final decision in his case. AF, Tab 24. The agency argues that both it and appellant knew of the DOD ◄**rotation**► policy and its effect on the appellant's term of employment. AF, Tab 25. The agency contends that it knew that the end of the appellant's term would create a vacancy in the appellant's office and accordingly that it hired another employee. *Id.*

While the appellant does not argue a violation of due process, I note that due process requirements mandate that, at a minimum, an employee be provided with notice of an agency's proposed action and an opportunity to respond. *See Office of Special Counsel v. Department of Veterans Affairs*, 75 M.S.P.R. 219, 222 (1997); *Stephen*, 47 M.S.P.R. at 680. In this case, it is clear that the appellant did receive advance notice of the agency's action as well as meaningful opportunity to respond. Ag. File, Tabs 4D and 4E. Although the appellant argues that the agency predetermined the outcome, the sole basis for his contention is the agency's hiring of another employee. In this case, however, it is clear that the appellant's term of employment was required to end according to the agency's ◄**rotation**► policy. Although the agency hired an employee to fill the vacancy which would be created by the appellant's separation, the agency maintained the appellant on its rolls until a final decision on his ◄**removal**► was rendered. The agency's final decision reflected consideration of the appellant's reply. Ag. File, Tab 4B. The appellant signed an ◄**agreement**► acknowledging that his term of employment would end on a date certain and, accordingly, the agency is not barred from relying on the ◄**agreement**► and planning for the agency's future by hiring employees to fill expected vacancies. Thus, I find no violation of due process nor evidence of harmful procedural error in this regard.

In sum, I find that the appellant has failed to establish his affirmative defenses by preponderant evidence.

The agency's finding that ◄**removal**► was the appropriate penalty will not be disturbed.

An agency may take an action against an employee under 5 U.S.C. Chapter 75 only for such cause as will promote the efficiency of the service. *See, e.g. Hatfield v. Department of the Interior*, 28 M.S.P.R. 673, 675 (1985). An adverse action promotes the efficiency of the service, satisfying the nexus requirement, when the grounds for the action relate to either the employee's ability to accomplish his duties satisfactorily or to some other legitimate government interest. *Id.* The nexus clearly exists in this case as the basis for the agency's action relates directly to the agency's interest in managing its ◄**overseas**► civilian workface in accordance with establish DOD employment policies.

The appellant argues that the agency's penalty was unreasonable due to its lack of notice regarding the specific requirements of the PPP. AF, Tab 24. As discussed above, it is my determination that the agency gave the appellant adequate notice. Given the agency's ◄**rotation**► policy, there was no lesser penalty which could be imposed as the appellant could not remain in ◄**overseas**► employment.

Penalty determinations are judgment calls within the discretion of the employing agency. *See Lachance v. Devall and Merit Systems Protection Board*, 178 F.3d 1246, 1251 (Fed. Cir. 1999). The Board may not independently determine penalties. *Id.* at 1259. Rather, in a case in which all of the charges against an appellant are sustained, the Board reviews the penalty selection to determine whether it is so excessive as to be an abuse of discretion or is otherwise arbitrary, capricious, or unreasonable. *See Douglas*, 5 M.S.P.R. at 302. In such cases, the Board will review an agency-imposed penalty to determine if the agency conscientiously considered all of the relevant mitigating factors and exercised management discretion without tolerable limits of reasonable. *Id.* at 306. In conducting its review, the Board will weigh these factors with the agency's discretionary authority to carry out its managerial functions in maintaining employee discipline and overall efficiency. *Id.* at 302. The Board's function in this regard is not to displace management's responsibility, but to assure that managerial judgment has been properly exercised. *Id.* In determining that the appellant's ◄**removal**► was warranted, the deciding official noted that the appellant had been advised of the requirements of the ◄**rotation**► policy and had specifically been advised that failure to request and accept a return assignment could result in his separation from employment. Ag. File, Tab 4B. The deciding official further found that the agency had provided the appellant with adequate notice and had declined a valid PPP offer. *Id.*

As discussed at length above, the appellant signed employment ◄**agreement**►s acknowledging limitations on the time he could hold an ◄**overseas**► position. In the last ◄**agreement**►, the appellant acknowledged that the extension of his employment would not exceed July 18, 2000.2 AF, Tab 1, Exhibit 4. The agency complied with its obligation to assist the appellant's placement efforts with the PPP and it presented the appellant with a valid employment offer which he declined. Accordingly, his term ended and he was properly removed. The appellant could no longer remain in his position because of the ◄**rotation**► policy and because he had no other employment with the Federal government. Accordingly, ◄**removal**► was warranted and supports the efficiency of the service. *See Soper*, 677 F.2d at 873 (employee who signed ◄**rotation**► ◄**agreement**► was under an obligation to return to the United States at the expiration of his tour of duty and his ◄**removal**► was sustained when he did not fulfill that obligation). Accordingly, the agency's action will not be disturbed.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD

Sherry A. Armstrong
Administrative Judge

NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the administrative judge may vacate the initial decision in order to accept a settlement ◄**agreement**► into the record. *See* 5 C.F.R. § 1201.112(a)(5).

NOTICE TO APPELLANT

This initial decision will become final on September 11, 2001, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.,
Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be postmarked, faxed, or hand-delivered no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you fail to provide a statement with your petition that you have either mailed, faxed, or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

FOOTNOTES

Footnote 1 The appellant would have had no benefits under the PPP had he remained in a limited ◀**overseas**▶ appointment.

Footnote 2 The appellant's tour of duty was subsequently extended to afford the appellant ample time to complete various projects and to provide him with appropriate ◀**removal**▶ procedures.

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