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MSPB Initial Decisions (MSPI)

RANSOM, RALPH D. VS NAVY

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Date: 09 MAR 2001

ALJ: Ben-Ami, Raphael

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

RALPH D. RANSOM, Appellant, v. DEPARTMENT OF THE NAVY, Agency.	)	DOCKET NUMBER DC-0752-01-0169-I-1 DATE: March 9, 2001

Ralph D. Ransom, London, England, pro se.

Lisa Conradi, London, England, for the agency.

BEFORE

Raphael Ben-Ami

Administrative Judge

INITIAL DECISION

The appellant timely appealed the agency's ◄**removal**► action. The Board has jurisdiction over this appeal. *See* 5 U.S.C. §§ 7511-7513, 7701. The appellant did not request a hearing, and I therefore decided this appeal based on the parties' written submissions. For the reasons discussed below, the agency's action is AFFIRMED.

BACKGROUND

Since 1982, the appellant has occupied a variety of civilian positions in London, England, with the Department of the Navy and the Department of Defense. On June 2, 1997, the appellant entered into a Foreign ◄**Overseas**► Area ◄**Rotation**► ◄**Agreement**► with the Department of the Navy, which placed him under the Department of Defense's (DoD's) policy limiting the duration of ◄**overseas**► employment. *See* Appeal File (AF), Tab 3, Subtab 4g, Enclosure 5. The ◄**Rotation**► ◄**Agreement**► specified that assignments to positions in ◄**overseas**► areas are for specific tours of duty, and that extensions beyond five years are subject to DoD policy which limits employment in foreign areas to five years. *See id.* The ◄**agreement**► further specified that, unless the agency extended the appellant's tour of duty, he would either exercise his return rights or agree to register in the DoD Priority Placement Program (PPP) for return placement in the United States. *See id.* In addition, the appellant was advised that his failure to accept a valid offer of employment pursuant to the conditions identified in the ◄**Rotation**► ◄**Agreement**► could result in

his ◀**removal**▶. *See id.*

By message dated November 7, 1997, the appellant was notified that his tour of duty would expire on April 3, 1998, and that he had no return rights. *See* AF, Tab 3, Subtab 4g, Enclosure 6. The appellant subsequently registered for the DoD's PPP, but voluntarily withdrew from the PPP for the period of November 10, 1998, through October 4, 1999, pending the outcome of an outstanding appeal with the Equal Employment Opportunity Commission (EEOC) addressing the application of DoD's ◀**rotation**▶ policy to the appellant. *See id.*, Enclosure 7. The appellant was reinstated in the PPP on October 4, 1999, after the EEOC determined that the agency had not breached a prior settlement ◀**agreement**▶ by subjecting him to the ◀**rotation**▶ policy. *See id.*, Enclosures 8, 9. The appellant's PPP registration resulted in a job offer on April 17, 2000, for a position as a Security Assistant, GS-5, at the Avionics Integration Support Facility, Hill Air Force Base, Utah. *See id.*, Enclosure 10. The appellant did not accept the PPP job offer, and he subsequently was removed from the PPP register and advised that his failure to accept the valid job offer could result in his ◀**removal**▶. *See id.*

By memorandum dated September 6, 2000, the agency proposed that the appellant be removed from his position as a GS-5 Mail Clerk based on his failure to accept a valid DoD PPP job offer in the United States following the April 3, 1998 expiration of his ◀**overseas**▶ tour of duty. *See* AF, Tab 3, Subtab 4g. After considering the appellant's written responses, the agency's deciding official determined that the reasons set forth in the proposal notice were supported by the evidence and warranted the appellant's ◀**removal**▶. *See id.*, Subtab 4b.

On appeal, the appellant claims that his ◀**removal**▶ was improper because he was not subject to the DoD's 5-year limitation on ◀**overseas**▶ employment. The appellant also contends that his ◀**removal**▶ was the result of discrimination based on his race (black).

ANALYSIS AND FINDINGS

Burdens of proof

The agency has the burden to prove the merits of its case by a preponderance of the evidence, and the appellant has the burden to prove his affirmative defense by a preponderance of the evidence. Preponderance of the evidence is defined at 5 C.F.R. § 1201.56(c)(2) as 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. In addition, the agency must show that the penalty it selected was within the bounds of reasonableness. *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 302, 306 (1981).

The agency has proven its charge by preponderant evidence.

The record shows that the appellant declined a valid DoD PPP job offer to a permanent, full-time position in the United States after his ◀**overseas**▶ tour of duty expired on April 3, 1998. The record further shows that the appellant entered into a ◀**Rotation**

► ◄**Agreement**► with the agency on June 2, 1997, which placed him under the DoD's policy limiting ◄**overseas**► employment to a maximum of five years. *See* AF, Tab 3, Subtab 4g, Enclosure 5. Moreover, the appellant did not come within any of the following recognized exemptions to the DoD's 5-year ◄**rotation**► policy: (1) Employees in the excepted service or the Senior Executive Service; (2) employees who have been ◄**overseas**► continually since before implementation of the 5-year ◄**rotation**► policy on June 1, 1966; (3) DoD military and civilian dependents; (4) employees in "◄**overseas**►-unique positions" (i.e., those positions requiring the incumbent to make almost daily contact with government officials of the host nation and to possess a detailed current knowledge of the cultures, mores, laws, customs or government processes of the host nation which cannot be acquired outside the host nation); and (5) individuals employed at the GS-6 level or lower or in non-supervisory wage grade positions as long as they remained continuously employed at those GS or WG grade levels after August 1988. *See* AF, Tab 3, Subtab 1, Enclosures 3, 9 (attachment 1). With respect to the latter, the record shows that the appellant had a 3-month break in service from June 16, 1989, to September 11, 1989. *See id.*, Enclosures 5, 6; AF, Tab 7.

Accordingly, I find that the agency has proven by preponderant evidence that the appellant was subject to the DoD's 5-year ◄**rotation**► policy and that he failed to accept a valid DoD PPP job offer after the expiration of his ◄**overseas**► tour of duty.

The appellant has not proven his affirmative defense of race discrimination.

The appellant alleges that the agency discriminated against him on the basis of race. To establish a claim of prohibited employment discrimination through circumstantial evidence, the appellant must first establish by preponderant evidence a prima facie case by showing that: (1) He is a member of a protected group; (2) he was similarly situated to an individual who was not a member of his protected group; (3) and he was treated more harshly or disparately than the individual who was not a member of his protected group. *See Buckler v. Federal Retirement Thrift Investment Board*, 73 M.S.P.R. 476, 497 (1997) (and cases cited therein). If the employee succeeds in establishing a prima facie case of discrimination, the burden of going forward shifts to the agency to articulate a legitimate nondiscriminatory reason for its different treatment of the appellant. *See Richard v. Department of Defense*, 66 M.S.P.R. 146, 152 (1995). If the agency articulates a legitimate, nondiscriminatory reason for its action, the appellant must be afforded the opportunity to show, by a preponderance of the evidence, that the proffered reason was not the true reason and was merely a pretext for discrimination based on prohibited factors. *Id.* The appellant must show both that the stated reason was false, or not the real reason for the action, and that discrimination was the real reason for the action. *Id.* Comparative employees are similarly situated when all relevant aspects of their employment situations are nearly identical to those of the appellant. *Id.* at 153.

The appellant listed a number of individuals who he claims were exempted by the agency from its 5-year ◄**rotation**► policy. *See* AF, Tab 1, appeal letter at page 2. The appellant did not adduce any evidence showing that he was similarly-situated to those employees, however. Further, the agency submitted evidence showing that the named employees were not subject to the same work conditions and/or policies as the appellant. *See id.*, Tab 3, Subtab 1, Enclosure 9, Rice declaration at pages 3-6. The appellant therefore has failed to establish a prima facie case of discrimination based on disparate treatment.

The appellant also alleges that his ◄**removal**► was motivated by the agency's discriminatory animus. Such discrimination claims properly are analyzed under the "mixed-motive" legal standard. *See Jones v. Department of the Navy*, 75 M.S.P.R. 115, 118 (1997). Under 42 U.S.C. § 2000e-2(m), "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." An appellant will prevail on his discrimination claim if he establishes by direct evidence, whether documentary or testimonial, that one of these improper motivating factors played a part in the agency's action. *See id.* If the appellant establishes that race was a motivating factor in his ◄**removal**►, the burden of production shifts to the agency to show that it would have taken the same action "in the absence of the impermissible motivating factor." *See id.* at 122 (citing 42 U.S.C. § 2000e-5(g)(2)(B)).

The record contains no evidence to even suggest that the appellant's race was a motivating factor in his ◄**removal**►. Moreover, the agency submitted evidence showing that white employees who refused DoD PPP job offers in the United States after their ◄**overseas**► tours of duty expired also faced the prospect of ◄**removal**►. *See* AF, Tab 3, Subtab 1, Enclosure 9 (and attachments). I therefore find that the appellant's ◄**removal**► properly was based solely on his failure to accept a valid DoD PPP job offer in the United States.

The agency's selected penalty is reasonable for the sustained charge and promotes the efficiency of the service.

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. *See id.* Plainly, such a nexus exists in the instant case, as the grounds for the action directly relate to the agency's interest in managing its ◄**overseas**► civilian workforce in accordance with established DoD employment policies.

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. *See 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 within tolerable limits of reasonableness. *See 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. *See 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. *See id.* When the Board sustains all of an agency's charges the Board may mitigate the agency's original penalty to the maximum reasonable penalty when it finds the agency's original penalty too severe. *See LaChance*, 178 F.3d at 1260.

In determining that the appellant's ◄**removal**► was warranted for the sustained charge, the agency's deciding official noted that the appellant had provided no documentary evidence to support his contention that he was not subject to DoD's 5-year ◄**rotation**► policy. *See* AF, Tab 3, Subtab 4b, decision letter at page 2. The deciding official further noted that the appellant had received "sufficient notice" of the consequences of failing to accept a valid DoD PPP job offer after the expiration of his ◄**overseas**► tour of duty. *See id.*

I therefore agree with the agency's deciding official, and find that disciplinary action based on the sustained charge promotes the efficiency of the service. I further find that the agency has shown that it properly exercised its managerial discretion in selecting the penalty of ◄**removal**►. *See Soper v. United States*, 677 F.2d 869, 872 (Ct. Cl. 1982) (employee who signed ◄**rotation**► ◄**agreement**► was under an obligation to return to the continental United States at the expiration of his tour of duty, and his ◄**removal**► was sustained when he did not fulfill that obligation).

Decision

The agency's action is AFFIRMED.

FOR THE BOARD _____

Raphael Ben-Ami
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on April 13, 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 Equal Employment Opportunity Commission (EEOC) or with a federal court. The paragraphs that follow tell you how and when to file with the Board, the EEOC, or the federal courts. 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 for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition 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.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION REVIEW

If you disagree with the Board's final decision on discrimination, you may obtain further administrative review by filing a petition with the EEOC no later than 30 calendar days after the date this initial decision becomes final. The address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 19848
Washington, D.C. 20036

JUDICIAL REVIEW

If you do not want to file a petition with the EEOC, you may ask for judicial review of both discrimination and nondiscrimination issues by filing a civil action. If you are asserting a claim under the Civil Rights Act or under the Rehabilitation Act, you must file your appeal with the appropriate United States district court as provided in 42 U.S.C. § 2000e-5. If you file a civil action with the court, you must name the head of the agency as the defendant. *See* 42 U.S.C. § 2000e-16(c). To be timely, your civil action under the Civil Rights Act, 42 U.S.C. § 2000e-16(c) must be filed no later than 30 calendar days after the date this initial decision becomes final. If you are asserting a claim under the Age Discrimination in Employment Act, your claim must be filed with the appropriate United States district court as provided in 29 U.S.C. § 633a(c). In some, but not all districts you may have up to 6 years to file such a civil action. *See* 28 U.S.C. § 2401(a).

If you choose not to contest the Board's decision on discrimination, you may ask for judicial review of the nondiscrimination issues by filing 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 of appeals before this decision becomes final. To be timely, your petition must be received by the court of appeals 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.

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