

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE**

KEVIN M. HOFFMANN,
Appellant,

DOCKET NUMBER
SE-0752-04-0073-I-1

v.

DEPARTMENT OF THE NAVY,
Agency.

DATE: June 15, 2005

Kevin M. Hoffmann, Gushikawa City, Okinawa, Japan, pro se.

Major Eric M. Lyon, FPO, APO/FPO Pacific, for the agency.

BEFORE

James H. Freet
Administrative Judge

INITIAL DECISION

INTRODUCTION

By appeal filed December 4, 2003, the appellant has challenged the action whereby the agency's Marine Corps Base Camp Smedley D. Butler, Okinawa, Japan, removed him from the position of Supervisory Information Technology Specialist, GS-2210-12. The action was effective November 8, 2003.

The Board has jurisdiction over this removal action. *See* 5 U.S.C. §§ 7511(a)(1)(A), 7512(1), and 7513(d). A telephonic hearing was convened on March 18, 2004. At that time, the parties agreed that this matter would be decided on the written record without presentation of witnesses. For the reasons discussed below, the action is **AFFIRMED**.

APPLICABLE LAW

In an appeal before the Board, an agency must establish, by a preponderance of the evidence, the factual accuracy of the charge on which removal is based, and further establish that removal under the circumstances will promote the efficiency of the service. *See* 5 U.S.C. §§ 7513(a) and 7701(c)(1)(B); *Hayes v. Department of the Navy*, 727 F.2d 1535 (Fed. Cir. 1984). If an agency proves its factual contentions and shows that some action is warranted (i.e., that there is a nexus between the basis for the action and the “efficiency of the service”), the Board will review the selected penalty only to the extent needed to assure that the agency’s “managerial judgment has been properly exercised within tolerable limits of reasonableness.” *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 302 (1981).

BACKGROUND

The appellant was employed at Camp Butler beginning in August 1991. He worked in the communications division which was known as G-6. His employment was under a series of 2-year overseas tours. He was required to receive a formal extension by the agency if he was to stay at Camp Butler beyond the expiration date of each tour. In the event that the appellant did not receive an extension of his overseas tour, he was eligible to return to employment with the Department of Defense (DoD) in the United States. He did not have return rights to a particular position, but was eligible to participate in the DoD’s Priority Placement Program (PPP) and to remain in his position at Camp Butler until a new position had been found for him. *See* Agency File, Tab 4h (PPP Checklist).

During the appellant’s employment in at Camp Butler, the agency followed a DoD policy to limit overseas employment to no more than a total of 5 years. Enforcement of this policy became more strict during the course of the appellant’s employment. Under a Marine Corps policy statement issued in 1989, extension beyond 5 years was apparently available simply upon certification that

there was a “continuing need” for the employee’s services. *See* Agency File, Tab 4k. In January 1999, the Commander, U.S. Marine Corps Bases, Japan, issued a policy statement which significantly tightened the extension policy. The 1999 policy held that the agency should “minimize” extensions beyond 5 years because keeping employees overseas for too long could lead to “individual ‘burn out’ and institutional stagnation.” *See* Agency File, Tab 4l. A September 2002 local Policy Letter at Camp Butler noted that justification was needed to overcome DoD’s 5-year limit and advised that extensions should be the “exception vice the rule.” *See* Agency File, Tab 4g.

It is undisputed that the appellant did not want to leave Okinawa. *See, e.g.*, Appellant’s Closing Submission, p. 14; Appellant Exhibit WW. He received 2-year tour extensions in 1993, 1995, 1997, and 1999. *See* Agency File, Tab 4j, pp. 5, 8, 15 and 19. The final extension continued his assignment until August 29, 2001. On December 4, 2000, the agency formally decided to deny the appellant a further extension. The appellant then registered with the PPP on March 1, 2001.

The position offer which lead to this action involved the position of IT Specialist (Network), GS-2210-12, with the Army’s Corps of Engineers, Humphrey’s Engineering Support Activity in Washington, D.C. The review regarding that vacancy began in December 2002. By January 9, 2003, both the agency and the Corps of Engineers had found the appellant to be well qualified for that position. *See* Agency Exhibit 23. The appellant initially accepted the position on January 15, 2003, but on January 16, 2003, he submitted a lengthy memorandum to the personnel office asserting that he was not actually qualified for the position because he lacked the technical skills for approximately 75% of the duties. *See* Agency Exhibit 2. On the basis of the appellant’s memorandum, the Civilian Assistance and Re-Employment Division (CARE) initiated a review of the qualifications issue. *See* Agency Exhibit 3. The CARE determination was issued on June 20, 2003. That determination was described as a consensus of the subject matter experts from both the Department of the Navy and the Department

of the Army. The expert for the Army stated that the appellant's concern about technical skill was unfounded because the position being offered involved "mainly analysis, procedures, and policy" with support staff being available for situations involving "hands-on" technical matters. *See* Agency Exhibit 11. The appellant submitted further correspondence on the issue of qualifications on June 30, 2003, and his outprocessing was suspended pending further review by CARE. *See* Agency File, Tab 4dd; Agency Exhibit 17. CARE reaffirmed its determination on August 20, 2003. *See* Agency File, Tab 4d. Although the appellant initially reaffirmed his acceptance of the Corp of Engineers position, he ultimately declined the positions.

This removal action was subsequently proposed by Maj. E. S. Birch, Operations Officer, G-6, on October 7, 2003. The removal decision was issued on November 6, 2003, by Lt.Col. Daniel. J. McGee, Assistant Chief of Staff, G-6.

ANALYSIS AND FINDINGS

This action is based on a charge of failure to accept a valid job offer under the PPP. Specifically, the agency bases the action on the appellant's declination of the position with the Corps of Engineers in Washington, D.C. It is undisputed that the appellant's overseas tour was not extended beyond August 29, 2001, that he remained employed in Okinawa because of his registration in the PPP, that he received the job offer from the Corp of Engineers, and that he ultimately declined that offer. The appellant disputes this action on the basis of contentions primarily related the decision not to extend his overseas tour and the legitimacy of the job offer he received through the PPP.

A charge of failure to accept a job offer after expiration of an overseas tour is essentially identical to a charge of failure to accept a directed reassignment. In appeals involving reassignments, the focus is on the legitimacy of the agency's reasons for the reassignment. When an adverse action is based upon an employee's failure to accept a directed reassignment, the agency has the initial

burden of proving by a preponderance of the evidence that that its decision to reassign the employee was bona fide and was based upon legitimate management reasons. To meet this burden, the agency must show that: (1) the reassignment was based upon a legitimate management reason; (2) the employee was given adequate notice of the reassignment; and, (3) the employee refused to accept the reassignment. If the agency establishes that it met these criteria, the burden shifts to the employee to demonstrate that the reassignment had not solid or substantial basis in personnel practice or principle. *See Krawchuk v. Department of Veterans Affairs*, 94 M.S.P.R. 641, ¶'s 8-10 (2003). The record in this case shows that there were legitimate management reasons for the actions which made the appellant's continued employment contingent on his acceptance of the PPP offer of a position with the Corps of Engineers.

The previously noted DoD formal overseas rotation policy clearly constitutes prima facie evidence of the existence of a legitimate management reason for the agency to require the appellant's rotation from his position at Camp Butler to a position in the United States selected through the PPP. The appellant raises several challenges to the rotation decision in his case.

The appellant first argument concerns a document known as a Rotation Agreement. These agreements are apparently in widespread use in situations involving overseas employment. The appellant has submitted a sample copy of a blank Rotation Agreement. *See Appellant Exhibit B*. It is in the form of a contract in which the employee agrees to exercise return rights by registering in the PPP at the end of a tour and the agency agrees to provide return rights and placement assistance. It is undisputed that the appellant did not have a Rotation Agreement in conjunction with his overseas employment. He contends that the absence of such an agreement meant that the agency had no basis to deny him continued overseas employment and no basis to make his continued employment contingent on accepting the position offered under the PPP. I cannot agree.

Systems for assignment of employees is a matter of management discretion. Specific contractual agreements are not a prerequisite for policies which provide for rotation of employees to new duty stations. Employees do not have veto power over management assignment decision even when family considerations are involved. Such considerations as hardship, inconvenience, and subjective satisfaction and not, in themselves, sufficient reasons for refusing a reassignment. *See Krawchuk*, 94 M.S.P.R. at ¶ 10; *Else v. Department of Justice*, 3 M.S.P.R. 397, 475 (1980). The agency had submitted the portion of the DoD Civilian Personnel Manual which governs overseas employment. *See* Agency Exhibit 14. Subchapter 4, "Rotation of Employees From Foreign Areas," notes the basic DoD policy to "limit civilian employment in foreign areas to 5 years." Subparagraph e. specifically addresses procedures for employees who are not serving under a Rotation Agreement. This provision provides for two narrow exceptions in which such employees will not be required to return to the United States against their wishes. The appellant clearly does not fit within either of these exceptions. The first exception is a grandfather clause which applies only to employees who have been employed in a foreign area "continuously since April 1, 1966." The appellant, who was first employed overseas in August 1991, missed this cutoff date by more than 25 years. The second exception applies only to individuals "employed in GS-6 or below or non-supervisory wage grade positions." The appellant held a GS-12 position. The foregoing shows that a Rotation Agreement simply sets out the procedures to be applied to certain overseas employees and does not serve to limit management's discretion to establish and enforce a reassignment policy involving other employees.

The appellant next questions the fairness of the application of the overseas rotation policy to his case. He contends that "at least up through 1997" the agency had not enforced the 5 year limit on overseas employment. He argues that this created a *de facto* policy of extensions which was violated in his case.

As was noted above, the agency follows a DoD-wide policy limiting the duration of overseas tours of duty. That policy and additional guidance from the agency allows exceptions in which tours may extend beyond the nominal limit of 5 years. Decision regarding such exceptions are clearly a matter of management discretion and are not subject to independent evaluation by the Board. However, an agency's obligation to have a legitimate management reasons for a reassignment action does allow Board review of whether an agency has abused its discretion in a decision which led to an appealable action.

I find no abuse of discretion in this case. First and most significant, there is no evidence of improper motive in the December 4, 2000, extension denial which ultimately led to the removal action. That decision was made by Col. Roger T. Farmer, Chief of Staff. *See* Agency File, 4j, p. 4. The record contains no evidence or allegation that Col. Farmer was guilty of improper motive in reaching his decision.¹ In the absence of any evidence to question Col. Farmer's good faith and integrity in reaching his decision on the extension request, I do not find a basis to question the existence of a legitimate management reason for the reassignment in this case. *See Teichmann v. Department of the Army*, 34 M.S.P.R. 447, 450-51 (1987) (presumption of good faith regarding deciding official in disciplinary action).

Second, as was noted above, DoD policy was modified in 1997 to reemphasize and strengthen the 5-year rule. Local policy at Camp Butler was

¹ Col. Farmer's extension denial was the subject of a previous whistleblower appeal by the appellant. *See Hoffmann v. Department of the Navy*, MSPB Dkt. No. SE-1221-01-0288-W-2 initial decision, slip op. (Nov. 12, 2002), *petition for review denied* 95 M.S.P.R. 626 (2004) (Table). That earlier appeal was decided on the threshold finding that there had not been a disclosure protected by the Whistleblower Protection Act. The issue of the motivation for Col. Farmer's decision was not reached. I note, however, that Col. Farmer had been selected on an *ad hoc* basis to make the extension decision because of a history of conflict between the appellant and the officer (Lt.Col. John McKnight) who would normally have made the decision. *See Hoffmann*, slip op. at 4.

also modified to look unfavorably on extensions beyond 5 years. Thus, more liberal practices in force at the time of the appellant's earlier extensions are of little significance in evaluating the propriety of the extension denial made in 2000.

Finally, the available statistical evidence fails to show that denial of an extension beyond 5 years should be viewed as a suspicious action by management. The appellant has presented a document entitled "Overseas Tour Status Report – 2000" which summarizes extension decision.² *See* Appellant Exhibit F. This report shows determinations made regarding overseas tours of 87 employees. Extensions were granted in 86% of those determinations. The favorable extension decisions included a high proportion of employees who were seeking extension beyond 5 years. This exhibit supports the view that, in the year 2000, Camp Butler generally had a more liberal extension practice than would have been expected under the restrictive official policy in effective. However, the base-wide policy (which apparently involved about 14 different organization) is of less importance to this review than the policy followed in G-6 where the appellant worked. In G-6, the 3 extension decision made during the period of May through November 2000 were all granted. *See* Appellant Exhibit F. By contrast, the appellant's decision in December 2000 and the only three later extension decision which were identified regarding other G-6 employees were all denials. *See* Appellant Exhibit UU (Deposition of Lt.Col. McGee, pp. 12-13). Lt.Col. McGee testified that the 5-year rule is now strictly enforced with extensions granted only in very rare situations. *See id.*, pp. 13-14. Thus, a

² The agency has object to this exhibit on the basis of authenticity. The agency argues that source of the document is not shown. The appellant contends that he received the document from the agency during discovery in his earlier whistleblower appeal. For purposes of analysis, I will accept this document. I note that information about tour extensions is available to the agency from its own records. Therefore, the agency could easily have refuted any inaccurate information contained in the document.

majority of the recent extension decisions in G-6 have been denials and the appellant appears to have been the employee who fell at the transition point between liberal and strict policies. While I understand the appellant's feeling that the extension decision was unjust, the denial of his extension request clearly was not so out of the ordinary that it suggests the absence of a legitimate management reason for the agency's decision.

The appellant also raises several challenges to the job offer made under the PPP. The appellant first contends that the agency acted improperly by insisting that he submit a revised statement of qualifications, known as a SF-171, after he had been in the PPP for approximately 18 months. He argues that the agency cannot require this change and that he was forced to falsify the form. The record confirms that the appellant was required to revise his SF-171. In a September 9, 2002, letter, the personnel office notified G-6 that the appellant had been registered in the PPP for more than a year without finding a position. *See* Appellant Exhibit K. The personnel office noted that this situation might be attributable to the quality of the application which the appellant had submitted. The personnel office requested that the appellant be required to provide a new application which thoroughly described his work experiences. The letter noted that failure to update the SF-171 could lead to removal from the PPP which, in turn, could lead to separation from employment. The agency was clearly dissatisfied with the SF-171 which was initially submitted by the appellant. For example, the director of the Human Resources Offices asserted in an internal e-mail that the form "contained less qualifying information than when we initially hired him." *See* Appellant Exhibit WW. The agency contends that the appellant used the initial SF-171 to "sabotage" his PPP application so that he could remain at Camp Butler.

I have reviewed the initial SF-171 provided by the appellant. *See* Agency Exhibit 29; Appellant Exhibit J.³ Although I need make no finding regarding the appellant's motivation, I agree with the agency regarding the effect the application would have on other agencies which might consider the appellant for a position. The SF-171 is handwritten in a careless manner which is often difficult to read, it emphasizes negatives regarding the appellant's qualifications, it contains statements that the appellant does not want to leave Camp Butler, and it contains gratuitous criticism of management at Camp Butler. In short, the SF-171 makes the appellant an unattractive candidate to potential employers. Despite the manifest problems with the initial SF-171, management left that resume in the PPP system for well over a year before the personnel office insisted that it be revised. I find no impropriety in their eventual insistence that the application be revised and improved in order for the appellant to remain in the PPP.

The appellant also argues that the revised SF-171 provided in response to the personnel office's demand for a more thorough application actually misrepresents his qualification and, therefore, could not be the basis for a valid job offer. The scope of the Board's review does not extend to re-examination and editing of the information contained in the SF-171. Determinations regarding the appropriateness of information in an SF-171 is made by those with knowledge of the employee's professional field and by specialists in personnel staffing. The appellant had a full opportunity to provide information and to make his views

³ I note that there is at least one difference in the parties' versions of the SF-171. An entry in the agency's version has been covered over in the copy provided by the appellant. *See* SF-171, Item A. The agency suggests that the copy provided by the appellant was deliberately falsified. However, I believe a finding of falsification would not be warranted. While the copy provided by the appellant has clearly been altered, there is no basis to determine when or why this occurred. The change may merely have been a step in the appellant's effort to comply with the personnel office's directive that he improve the SF-171.

known to the agency's personnel specialists in Japan and Hawaii as well as the Army's personnel specialists in Illinois. *See, e.g.,* Appellant Exhibits BB; Agency Exhibit 3; Agency File, Tab 4dd. Those specialists sometimes sought additional information based on points raised by the appellant. *See, e.g.,* Agency Exhibits 4, 6, 20. Absent direct evidence of improper influence on these experts, I will not question their determination of the adequacy of the information they used in forming their opinions regarding the appellant's qualifications.

Finally, the appellant raises arguments which focus on the claim that he was not actually well qualified for the Corp of Engineers position. He discusses at length his view of his own qualification and of the requirements of the position. He has submitted statements from several individual with knowledge of his experience who support his opinion. These statement were provided by five individuals who were supervised by the appellant at various times between 1996 and 2003 and by a supervisory employee in Hawaii who met the appellant in a training course. *See* Appellant Exhibits DD, EE, FF, GG, HH, II. The appellant has also noted that, during an intermediate stage in the CARE evaluation, an agency expert offered the opinion that he was not qualified. *See* Appellant Exhibit III. An independent evaluation of the appellant's qualifications is beyond the scope of the Board's review. As with the decision to not extend the appellant's overseas tour, I will review the PPP process only to determine whether there was a legitimate management basis for the action which occurred. In this case, there clearly was a legitimate basis for the determination regarding qualifications. The decision to offer the position under the PPP was made after the normal review process and a lengthy (approximately 5 months) supplemental review by CARE which involved agency personnel specialists in Japan and Hawaii as well as the Army's personnel specialists in Illinois. This review included a lengthy explanation of the qualifications by a subject matter expert in Hawaii. *See* Agency Exhibit 8 (Memorandum from James A. Finn, Jr. Ph.D.). Although opinions differ on the question of the appellant's qualifications, the

record shows that there was a thorough review by the agency which developed a significant body of opinion from disinterested experts which supported the job offer in question. This expert opinion is clearly sufficient to place the job offer within the zone of the agency's legitimate management discretion.

The foregoing analysis shows that there were legitimate management reasons for both the decision not to extend the appellant's overseas tour and the determination that the position with the Corps of Engineers was the job opportunity under the PPP. Consequently, the reassignment in question here was legitimate. Since there is no dispute that the appellant received proper notice of the position offered under the PPP and that he declined that offer, the charge of failure to accept the job offer is SUSTAINED.

ALLEGATION OF HARMFUL PROCEDURAL ERROR

An agency's decision in an adverse action may not be sustained if the employee "shows harmful error in the application of the agency's procedures in arriving at such decisions." *See* U.S.C. § 7701(c)(2)(A); *see also* *Stephens v. Department of the Air Force*, 47 M.S.P.R. 672, 681 (1991). Harmful error is: "error by the agency in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one which it would have in the absence or cure of the error." *See* 5 C.F.R. § 1201.56(c)(3). Reversal of an agency's action is warranted where the appellant establishes that the agency committed a procedural error, whether regulatory or statutory, which substantially prejudiced his rights by possibly affecting the outcome of the case before the agency. *See* *Turner v. U.S. Postal Service*, 85 M.S.P.R. 565, ¶ 5 (2000).

The appellant contends that the agency committed harmful procedural error in this removal action because the deciding official, Lt.Col. McGee, felt he had no penalty option other than removal. The appellant argues that the deciding official should have had the option to disregard the rotation policy and simply

extend his overseas tour. Lt.Col. McGee testified that he felt he had no option because of the facts which were presented to him. *See* Appellant Exhibit UU, p. 31. He noted, however, that he would have supported the appellant (presumably by holding the decision in abeyance) if the appellant had relented and said he would accept the position offer. *See id.* The mere fact that an agency has an established policy which provides for uniform treatment of employees in certain situations does not constitute interference with the discretion of a deciding official. The agency had an established policy regarding extension of overseas tours and a policy granting employees a single opportunity to accept a valid job offer through the PPP. Such a policy would be meaningless if individual deciding officials could simply decide to take no action against an employee who declined his PPP job offer.

The appellant also claims procedural error in the failure of the agency to provide him a requested copy of DoD Manual 1400.20-IM which was one of the documents referenced in the proposed removal letter. The personnel office advised the appellant that this documents was not maintained in the local office. *See* Appellant Exhibit RR. The manual in question was merely one of six documents (statutory provisions, manuals, and policy statements) which were listed, but not quoted, as references at the beginning of the notice letter. *See* Agency File, Tab 4b. There has been no showing that examination of the manual itself would have changed the appellant reply to the notice or would have affected Lt.Col. McGee's decision. Consequently, harmful error has not been shown.

NEXUS

There is a clear nexus between the efficiency of the service and failure to accept a directed reassignment. *See, e.g., Thornhill v. Department of the Army*, 50 M.S.P.R. 489 (1991) (failure to report for new assignment after end of overseas tour); *O'Connor v. Department of the Interior*, 21 M.S.P.R. 687, 690 (1984) (failure to accept a directed reassignment).

ALLEGATION OF REPRISAL

Title 5 U.S.C. § 7701(C)(2)(b) provides that, even if it is otherwise proper, an agency decision may not be sustained by the Board if the appellant shows the decision was based on a prohibited personnel practice described in 5 U.S.C. § 2302(b). The appellant contends that the agency violated 5 U.S.C. §§ 2302(b)(9)(A) by taking reprisal for his previous exercise of appeal, complaint, and grievance rights.

An appellant must prove the affirmative defense of reprisal by a preponderance of the evidence. *See* 5 U.S.C. § 7701(c)(2)(B); 5 C.F.R. § 1201.56(a)(2)(ii). To prevail on a contention of illegal reprisal under 5 U.S.C. § 2302(b)(9), an appellant has the burden of showing that: (1) he engaged in protected activity; (2) he was subsequently treated adversely; (3) the accused official had actual or constructive knowledge of the protected activity; and (4) there was a causal connection between the protected activity and the personnel action. *See Doe v. U.S. Postal Service*, 95 M.S.P.R. 493, ¶ 11 (2004). A removal action of the type in question here might be found improper if that discipline was ultimately traced to a management action which was motivated by reprisal for the exercise of employee rights. *See Yaksich v. Department of the Air Force*, 71 M.S.P.R. 355, 364 (1996) (allegation of discrimination relevant in non-extension of overseas tour).

There is no dispute that the appellant had previously filed complaints and grievances and no dispute that there was friction between him and some agency officials, including some managers in G-6. Lt.Col. McGee, who had been pleased with the appellant's work and was generally supportive of him, testified that some individuals hated the appellant. *See* Appellant Exhibit UU. pp. 18-19. However, Lt.Col. McGee did not attribute this attitude to the appellant history of protected activity. Rather, he was of the opinion that the appellant had alienated

himself from these individuals by his “abusive nature towards them” and his “unwillingness to work with them.” *See id.*

While there was hostility toward the appellant in some quarters, the record does not show a nexus between that hostility and this removal action. Despite any ill feelings which may have existed in the local personnel office, the qualifications review conducted by CARE appears to have been thorough and conscientious. Also, I find no evidence that would call into question the objectivity and good faith of the other individuals who made critical decisions in the events leading to the appellant’s removal – Col. Farmer who made the non-extension decision, the personnel experts in Hawaii and Illinois, and Maj. Birch the proposing official. The deciding official, Lt.Col. McGee, had been very pleased with the appellant’s work and would apparently have been happy to have him stay in G-6. In the absence of a nexus, the affirmative defense of reprisal has not been proven.

PENALTY

The appellant makes a general contention that the agency did not properly consider the possible mitigating factors set forth in the *Douglas* decision. However, the appellant has not identified any alternative agency action other than simply disregarding the rotation policy and continuing his assignment to Camp Butler. That clearly would not be reasonable. Lt.Col. McGee’s testimony shows that he would have been receptive to the only alternative which might reasonably have led to a different outcome - the appellant relenting on his rejection of the Corp of Engineers job offer. However this situation did not arise.

In view of the end of the appellant’s overseas tour and his refusal to accept the legitimate offer of a new position in the United States, I find that the penalty of removal is within the “tolerable limits of reasonableness” required by *Douglas*, 5 M.S.P.R. at 302. *See Thornhill*, 50 M.S.P.R. at 484-85 (1991) (removal for failure to report for duty in position in the United States after employee’s

overseas tour had ended and he had exercised re-employment rights); *O'Connor*, 21 M.S.P.R. at 690 (removal for refusal to accept a legitimate reassignment).

DECISION

The agency's action is AFFIRMED.