

Constructive Demotion

I. DISCUSSION

Constructive demotion is an emerging concept in personnel management that has been defined over the last 15 years through decisions issued by the Merit Systems Protection Board (MSPB). The concept arose in connection with the reassignment of employees whose positions were subsequently found to warrant a higher grade. The reassignments were effected without affording employees procedural due process normally provided in adverse actions, as required by Section 752.404 of title 5, Code of Federal Regulations. In some cases, affected employees have appealed to MSPB, claiming that their reassignment was, in fact, a reduction in grade (Subchapter II of chapter 75 of title 5, United States Code).

While MSPB lacks jurisdiction over classification matters, it does review classification and promotion issues in conjunction with claims of constructive demotion. MSPB's decisions indicate that the burden of proof rests with the employee to demonstrate that a constructive demotion has occurred as a result of a reassignment. Cases receiving favorable consideration by MSPB have been supported by evidence showing that: (a) the upgraded position was identical to the position from which the employee was reassigned, (b) the position from which the employee was reassigned was worth the higher grade at the time of the reassignment, (c) the reassignment was involuntary, and (d) the employee would have been promoted to the reclassified position had the reassignment not occurred.

II. CASE SUMMARIES

Constructive demotion was initially defined by MSPB in *Russell v. Department of the Navy*, (1981), and refined in *Grigsby v. Department of the Army* (1990) and *Hammons v. Federal Emergency Management Agency* (1993). MSPB has issued at least 17 decisions dealing with constructive demotion. The following summaries of *Russell v. Navy* and four other significant cases outline MSPB's findings and analysis of critical issues in allegations of constructive demotion.

1. Richard C. Russell v. Department of the Navy

On January 16, 1979, the appellant was reassigned from the position of Supervisory Employee Development Specialist (EDS), GS-235-11, to the position of Employee Development Specialist, GS-235-11. The agency had previously processed an identical reassignment, effective October 23, 1978, as an adverse action, i.e., reduction in rank, in accordance with the provisions of 5 C.F.R. Part 752-B (1978), but abandoned the action on January 5, 1979. The reassignment of January 16, 1979, was not effected in accordance with adverse action procedures. On June 30, 1979, the agency established the position of Supervisory Employee Development Specialist, GS-235-12. This position was filled through competitive promotion procedures, resulting in the selection of a candidate other than the appellant. Mr. Russell appealed the reassignment, contending that it was, in fact, a reduction in grade.

The agency contended that the GS-12 Supervisory EDS position was established through planned management action, based on a need to realign work in the division, and that the GS-12 position contained only a portion of the duties of the GS-11 Supervisory EDS position previously

occupied by the appellant. The agency therefore asserted that it was not permitted to promote the appellant noncompetitively to the higher graded position. The agency further claimed that it abandoned the October 23, 1978, adverse action because of its discovery that the notice of its decision in the action had been received by the appellant after the effective date of the reassignment, thereby rendering the entire action procedurally defective. The agency also claimed that it did not follow adverse action procedures in effecting the reassignment of January 16, 1979, because a reduction in rank was no longer considered an adverse action under the Civil Service Reform Act (CSRA).

MSPB found that Congress's use of the term "reduction in grade" in lieu of "reduction in rank" was an indication that an employee's right to a promotion under classification law was an employee interest that Congress intended to remain protected by adverse action procedures. MSPB concluded that an employee is reduced in grade when:

- (1) The employee is reassigned from a position which, due to issuance of a new classification standard or correction of a classification error, is worth a higher grade,
- (2) The employee meets the legal and qualification requirements for promotion to the higher grade, and
- (3) The employee who held that position is permanently reassigned to a position classified at a grade level lower than the grade level to which the employee would otherwise be promoted.

MSPB found that a decision as to whether a reduction in grade took place in the instant case required further findings of fact and conclusions of law. The facts at issue were: (a) whether the position encumbered by the appellant at the time of the reassignment was worth a higher grade due to a change in a classification standard or a classification error and (b) whether the appellant met the legal and qualification requirements for promotion at the time of his reassignment. Since the evidence of record was inadequate for proper resolution of these issues, the case was remanded for further proceedings.

2. Darrel W. Hammons v. Federal Emergency Management Agency

Mr. Hammons appealed to MSPB on October 16, 1992, asserting that the Federal Emergency Management Agency (FEMA), had subjected him to a constructive demotion without benefit of procedural due process. The appellant served as the GS-13 branch chief of the agency's Technological Hazards Branch within the Natural and Technological Hazards Division. In July 1992, the agency reclassified the branch chief position and determined that it should be filled by a GM-14 Supervisory Technological Hazards Program Specialist. In October 1992, the appellant was reassigned to a nonsupervisory GS-13 position. Although the appellant applied and was determined to be among the best qualified candidates for the GM-14 branch chief position, another individual was selected for the new position.

The appellant contended that the GM-14 branch chief position was merely a reclassification of his former GM-13 branch chief position, and that he should have been promoted to the GM-14 level when the position was reclassified. He further argued that FEMA's failure to do so constituted a constructive demotion effected without affording him any of the required procedural due process normally provided with an adverse action. In response, FEMA officials insisted that a regional reorganization resulted in the creation of different branches which, in

turn, necessitated a reclassification of the branch chief position because of the increased supervisory responsibilities assigned to that position. The agency maintained that because the new GM-14 branch chief position was not the same position as that formerly held by the appellant at the GM-13 level, he was not entitled to automatic promotion into the new position.

The appellant's testimony demonstrated that, in his capacity as GM-13 branch chief, he had performed every duty listed in the position description for the GM-14 branch chief position. The appellant supported his testimony with specific comparisons of the GM-14 position description to his former GM-13 position description, his former GM-13 performance plan, and examples of actual work he performed in his capacity as the GM-13 branch chief. He pointed to the agency's organization chart to demonstrate that the organizational level of the new GM-14 branch chief was exactly the same as the one he encumbered as the GM-13 branch chief.

MSPB found the appellant's testimony to be highly credible. The judge also found that the duties of the appellant's former GM-13 branch position and those of the "new" GM-14 branch position were virtually identical. Moreover, the record contained undisputed evidence that the appellant was legally qualified for the GM-14 position. Thus, the judge concluded that the agency's failure to retain the appellant in the upgraded branch chief position constituted a reduction in grade within the meaning of 5 U.S.C.

7512(3). Consequently, the agency was ordered to cancel the reduction in grade and retroactively promote the appellant to the GM-14 level, effective October 18, 1992.

Hammons v. FEMA was significant in that it added a fourth condition to the three established by ***Russell v. Navy***:

(4) A different person is appointed to the position that is found to merit a higher grade. (See also ***McErney v. Merit Systems Protection Board***), May 1992.

3. Dan R. Savelly v. General Services Administration

The appellant was reassigned from a GS-5 Federal Protection Officer (FPO) position to the position of Communications Equipment Operator (Dispatcher) at the same grade and pay effective May 22, 1989. On August 18, 1989, the Office of Personnel Management (OPM) issued a decision upgrading the FPO position previously held by the appellant to the GS-6 level. The appellant contended that his reassignment constituted a constructive demotion without due process. However, the agency argued that at the time the appellant was reassigned, it had no knowledge that OPM would later upgrade the position. The agency also contended that the appellant had not established that he would have been upgraded had he remained in the FPO position.

The San Francisco Regional Office of MSPB found no merit in the appellant's argument that his reassignment was a constructive reduction-in-grade. The evidence clearly showed that at the time of the appellant's reassignment, the agency had no knowledge that the FPO position would be subsequently upgraded by OPM; nor had the appellant shown that he would have been necessarily upgraded as a result of the OPM decision. The appellant's reassignment was, in fact, based on the agency's legitimate concerns that the appellant was not properly performing his FPO duties. MSPB determined that, absent a showing (as required by ***Russell v. Navy***) that the position from which reassigned was worth the higher grade at the time the reassignment was

effected, no constructive reduction-in-grade can occur. Furthermore, the appellant did not show that he would have automatically been upgraded to the GS-6 level. Nor did he show any lack of good faith on the part of the agency when he was reassigned or that the agency's actions were a guise to circumvent applicable rules and regulations. Accordingly, MSPB found that the weight of the evidence did not show a constructive demotion and the appellant's case was dismissed.

4. Hiawatha Grigsby, Jr. v. Department of the Army

As part of a settlement agreement resulting from a discrimination complaint, the appellant was reassigned from a WG-5 Cryogenics Air Conditioning Mechanic Helper position to a WG-5 Electronics Equipment Helper position. On March 8, 1989, he appealed to the San Francisco Regional Office of MSPB claiming that while he had been employed as a WG-5 Cryogenics Air Conditioning Mechanic Helper, he had been performing WG-8 level duties. He stated in his petition that he had requested an audit of the position, that an audit had been performed, and that agency officials had concluded that the duties he had been performing were in fact WG-8 level duties.

In the initial decision, the administrative judge found that the appellant had not met his burden of proving MSPB jurisdiction, and the appeal was dismissed. Upon reopening the case, MSPB found that the appellant agreed to the reassignment when he entered into the agreement settling his discrimination complaint against the agency. MSPB further noted that while the position in question could have been classified at a higher grade level, the appellant voluntarily accepted the reassignment knowing that his former position could have been classified at a higher level. Thus, the case was dismissed.

5. Donna Sue F. Shadis v. United States Postal Service

The appellant occupied an EAS-15 Postmaster position in Clifton, Virginia, when the agency proposed her reassignment and change to a lower grade because she failed to carry out her assigned duties. In a letter dated February 12, 1988, the agency notified the appellant that she would not be reduced in grade or pay, but that she would instead be reassigned to an EAS-15 Supervisor position located at another postal facility. The appellant appealed her reassignment to MSPB's Philadelphia Regional Office, contending that her reassignment was, in effect, a reduction in grade or pay. Specifically, the appellant argued that, under Postal Service regulations, the increased volume of mail at the Clifton Post Office required a reclassification of that facility to an EAS-18 post office, and that such an upward reclassification of the facility would result in an automatic promotion of the Postmaster to the EAS-18 grade level. Although the appellant did not dispute the agency's contention that no such upgrading had occurred at the time of her reassignment, the appellant nevertheless contended that Postal Service regulations required an upgrading of the Clifton Post Office, and that her reassignment deprived her of the resulting promotion. Relying on the MSPB's decision in *Russell v. Navy*, the appellant argued that the agency's failure to promote her to the upgraded position constituted a reduction in grade or pay.

In the initial decision, the administrative judge found *Russell* to be inapplicable because the appellant was not in the competitive service and did not claim that a higher graded position to which she could have been promoted had already been created. The administrative judge denied the appellant's request that the agency be required to reclassify her former position and promote

her to the newly reclassified position.

The appellant filed a motion to reopen her case on December 5, 1988. MSPB found that an analysis similar to that used by MSPB in *Russell v. Navy* was appropriate, as *Russell* could not be found inapplicable merely on the grounds that it involved an employee in the competitive service. The evidence showed that the workload at the Clifton Post Office warranted an upgrade of that facility and that the facility was actually upgraded to EAS-18 in November of 1988. The evidence supported the appellant's contention that when a post office obtains a certain level of workload service credits, it is automatically upgraded. The documents also supported the appellant's contention that the Clifton Post Office was eligible to be upgraded. Therefore, MSPB remanded the appellant's case to the Philadelphia Regional Office so that the administrative judge could address the issue of the appellant's alleged constructive demotion in light of the new evidence.

III. SUMMARY

We expect that MSPB will continue to clarify and further define constructive demotion in future decisions. As indicated by the above case summaries, a combination of four conditions existing together constitute a constructive demotion:

- (1) The employee is reassigned from a position that is subsequently upgraded as a result of the issuance of a new classification standard or correction of a classification error,
- (2) The reassigned employee meets the legal and qualification requirements for promotion to the higher grade, and
- (3) The employee is involuntarily reassigned to a position at a lower grade than the upgraded position, and
- (4) A different person is appointed to the position that is found to warrant a higher grade.

It is important to recognize that MSPB decisions in no way restrict management's legal right to assign work and effect placement actions. As is the case with all adverse actions, a reassignment that effectively reduces an employee in grade must be effected under the applicable provisions of Part 752, title 5, Code of Federal Regulations, affording the affected employee procedural due process as required by section 752.404.

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