UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 226

Docket No. SF-0353-09-0202-I-1

Charles Smith,

Appellant,

v.

United States Postal Service,

Agency.

December 11, 2009

Glenn L. Smith, Esquire, Grand Rapids, Michigan, for the appellant.

Corrine H. Lee, Esquire, San Francisco, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant petitions for review from an initial decision denying his request for restoration as a partially recovered employee. For the reasons stated below, we GRANT the appellant's petition, VACATE the initial decision denying the appellant's request for restoration, and REMAND the appeal for further consideration in accordance with this Opinion and Order.

BACKGROUND

¶2 The appellant was previously employed as a Distribution Operations Supervisor by the agency. Initial Appeal File (IAF), Tab 12, Exhibit (Ex.) A at 1.

Due to a work-related injury, he received benefits from the Office of Workers' Compensation Programs (OWCP) from 1995 until 2006, when he returned to work as a Distribution Operations Supervisor. *See id.*; IAF, Tab 12, Ex. 1. His receipt of OWCP benefits resumed later in 2006 when he took medical leave as a result of aggravation to his pre-existing conditions. IAF, Tab 12, Ex. A at 1. On December 21, 2007, the appellant's clinical psychologist sent a letter to the agency stating that the appellant was able to return to work under certain restrictions, which included not working in a particular district and not holding a supervisory position. *See id.*, Ex. 2. In January 2009, the appellant applied for the position of Mail Transport Equipment Quality Specialist, EAS-17 (MTE position), and in March 2009, he applied for the position of Labor Relations Specialist EAS-17 (LR position). *Id.*, Ex. A at 2; *id.*, Exs. 4-5. He was not selected for either position. He filed a restoration appeal with the Board, asserting that the agency's decisions not to select him for the MTE and LR positions were arbitrary and capricious and thus violated his restoration rights as a partially recovered individual. *See* IAF, Tab 12 at 1-4. He did not request a hearing. IAF, Tab 1 at 2.

¶3 The administrative judge (AJ) found that the appellant was absent from his position with the agency due to a compensable injury, that he recovered sufficiently to return to work in a position with less demanding physical requirements, and that he communicated a request to return to duty by applying for the MTE and LR positions. IAF, Tab 17, Initial Decision (ID) at 5. He also found that the appellant made a nonfrivolous allegation that the agency's denial of his request for restoration was arbitrary and capricious and that he therefore established Board jurisdiction over his appeal. *Id.* However, the AJ found that the appellant failed to show by preponderant evidence that the agency acted arbitrarily and capriciously in denying his request for restoration. *Id.* at 10. With respect to the MTE position, he found that the appellant failed to adequately address the knowledge, skills, and abilities questions in the application, while the

other two candidates did, and thus the agency's decision not to select him was not arbitrary and capricious. *Id.* at 6-7. With respect to the LR position, the AJ found that the initial posting was cancelled and no applications were reviewed. *Id.* at 7. He further found that the position was reposted under "[Reduction-In-Force (RIF)] avoidance procedures" but eligibility was limited to "EAS employees in certain components of the Bay Valley District that would be potentially affected by the elimination of 28 positions in the District." *Id.* at 7-8. He found that the agency's decision in this regard was neither arbitrary nor capricious, but rather a "prudent step taken in anticipation of the inevitable adverse impact of the elimination of positions." *Id.* at 8. Furthermore, he found that the appellant failed to show that there were any vacant funded positions in his commuting area that met his medical restrictions at the time the agency conducted its search. *Id.* at 9. He thus denied the appellant's request for restoration. *Id.* at 10.

¶4 The appellant has filed a timely petition for review. *See* Petition for Review File (PFRF), Tab 1. The agency has not filed a response.

ANALYSIS

¶5 In his petition for review, the appellant challenges the initial decision only as it relates to the agency's failure to select him for the LR position. *See* PFRF, Tab 1 at 1. To establish Board jurisdiction over a restoration claim as a partially recovered employee, an appellant must make nonfrivolous allegations that: (1) he was absent from his position due to a compensable injury; (2) he recovered sufficiently to return to duty on a part-time basis, or to return to work in a position with less demanding physical requirements than those previously required of him; (3) he requested restoration within certain limitations, and the agency denied his request for restoration; and (4) the agency's denial was "arbitrary and capricious." *Hardy v. U.S. Postal Service*, 104 M.S.P.R. 387, ¶ 17, *aff'd*, 250 F. App'x. 332 (Fed. Cir. 2007); *Chen v. U.S. Postal Service*, 97

M.S.P.R. 527, ¶ 13 (2004). The appellant bears the burden of proving the merits of his restoration claim by preponderant evidence. *Hardy*, 104 M.S.P.R. 387, ¶ 17.

¶6 It is undisputed that the appellant was absent from his position due to a compensable injury, that he was released to work with medical restrictions, and that the agency denied his request for restoration. *See* IAF, Tab 12, Exhibits (Exs.) 1-2; ID at 4-5. Thus, the appellant was required to prove only that the agency's denial of his restoration request was arbitrary and capricious. *See, e.g.*, *Hardy*, 104 M.S.P.R. 387, ¶ 17. The restoration regulations at 5 C.F.R. § 353.301(d) require that agencies "make every effort to restore in the local commuting area, according to the circumstances in each case, an individual who has partially recovered from a compensable injury and who is able to return to limited duty." *See Taylor* v. *Department of Homeland Security*, 107 M.S.P.R. 306, ¶ 7 (2007). Agencies are required to treat partially recovered employees substantially the same as an individual with a disability under the Rehabilitation Act of 1973 and the Americans with Disabilities Act (ADA), which require that the agency must make reasonable accommodation of an employee's disability through means such as modifying or adjusting the duties of the position at issue, or reassigning the employee to a vacant position whose duties the employee can perform. *Taylor*, 107 M.S.P.R. 306, ¶¶ 7-8; 5 C.F.R. § 353.301(d); 29 C.F.R. § 1630.2(o)(1)(ii), (o)(2)(ii); ID at 4.

¶7 The appellant asserts that the agency failed to demonstrate that accommodating him by placing him in the LR position posed an undue hardship and that the AJ thus erred in finding that the agency did not act arbitrarily and capriciously in denying his restoration. PFRF, Tab 1 at 2-3. He further asserts that the agency's reliance on RIF avoidance in failing to place him violated the agency's obligations under 5 C.F.R. § 353.301(d) and the Employee and Labor Relations Manual (ELM). *Id.* at 7. He emphasized that the agency's decision was based only on speculation that a RIF would occur and that employees who

may be subject to a RIF in the future do not have priority restoration rights over a partially recovered employee. *Id.*

¶8 Under the Rehabilitation Act and the ADA, an agency is required to afford reasonable accommodation to the known limitations of a qualified individual with a disability unless it can demonstrate that the accommodation would impose an undue hardship on the operation of its program. *Combs v. Social Security Administration*, 91 M.S.P.R. 148, ¶ 23 (2002); 29 C.F.R. § 1630.9(a). The agency bears the burden of production to show that a reasonable accommodation would impose an undue hardship on the agency. *Henry v. Department of Veterans Affairs*, 100 M.S.P.R. 124, ¶ 15 (2005). By solely relying on RIF avoidance to explain its failure to review the application of the appellant, the agency failed to demonstrate that accommodating him by restoring him in the LR position would have been an undue hardship. *See Henry*, 100 M.S.P.R. 124, ¶ 15; *Combs*, 91 M.S.P.R. 148, ¶ 23. While the selecting official for the LR position stated that approximately 28 district positions "had been eliminated," the agency failed to submit evidence showing that a RIF actually took place and the LR position was filled. *See* IAF, Tab 15, Subtab B at 2. Rather, the agency apparently sought to leave the LR position open for employees who might be impacted on the chance that a RIF would occur. The agency also failed to cite authority establishing that such a RIF-avoidance procedure excuses its obligation to comply with 5 C.F.R. § 353.301(d). Accordingly, the appellant proved by preponderant evidence that the agency's denial of his request for restoration was arbitrary and capricious, and therefore the AJ erred in holding otherwise. *See* ID at 8.

¶9 If the appellant is qualified for the LR position, he was entitled under 5 C.F.R. § 353.301(d) and the Rehabilitation Act, to be placed in it or another appropriate position within the local commuting area whose duties he can perform with reasonable accommodation if necessary. *See Taylor*, 107 M.S.P.R. 306, ¶ 10. While the appellant submitted the agency's posting for the LR position

and the cover letter and resume he submitted to the agency to apply for the position, *see* IAF, Tab 12, Exs. 5, 7-8, we find that there is not enough evidence in the record for us to determine whether the appellant is qualified for the LR position. Therefore, the parties must be given the opportunity to submit additional evidence and argument on this issue.

ORDER

¶10 Accordingly, we VACATE the initial decision and REMAND this case to the regional office for further consideration, consistent with the analysis in this Opinion, and for issuance of a new initial decision. *See Taylor*, 107 M.S.P.R. 306, ¶¶ 13-14.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.