MARCELLA ALBRIGHT v. UNITED STATES POSTAL SERVICE
Docket # DC-0752-11-0196-I-1
Petition for Review
Summary Page

Case Title : MARCELLA ALBRIGHT v. UNITED STATES POSTAL SERVICE

Docket Number : DC-0752-11-0196-I-1

Pleading Title : Petition for Review

Filer's Name : Marcella Albright

Filer's Pleading Role : Appellant

Details about the supporting documentation

N/A

Table of Contents

Pleading Interview	3
Uploaded Pleading Text Document	4
Certificate of Service	8

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Online Interview

1. Would you like to enter the text online or upload a file containing the pleading?

See attached pleading text document

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2. Does your pleading assert facts that you know from your personal knowledge?

Yes

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3. Do you declare, under penalty of perjury, that the facts stated in this pleading are true and correct?

Yes

MARCELLA ALBRIGHT, Appellant,
v.
UNITED STATES POSTAL SERVICE, Agency.

DOCKET NUMBER DC-0752-11-0196-I-1
DATE:

Appeal of the Original Decision

The administrative judge, Sherry A. Zamora, has completely ignored part of my appeal, an essential part, which shows that the decision of the United Stated Postal Service (USPS) to send me home because of "no work" is arbitrary and capricious.

What Judge Zamora has ignored is the fact that I was in a bid position [redacted] performing work that is normally assigned to regular custodial workers. This is a permanent, encumbered position that I can perform within my physical limitations. The file submitted by the United States Postal Service (USPS) supports this claim. USPS Tab 4(a) – page 25 – is my latest SF-50. In section 84 (the remarks section) of my latest SF-50, the USPS documents that my Labor Distribution Code (LDC) was changed from 38 to 67. LDC 38 is the code for a regular custodian. LDC 67 is for LWOP-ID (Leave With Out Pay – Injured on Duty). If I had not been in an encumbered position, the LDC code on my SF-50 would have been 69. In USPS Tab 4(g) – page 1474 – the SF-50 shows that I have been classified as a regular (LDC code 38) custodian for at least two years, possible longer. Additionally, in tab 4(g) – page 1471 – the last Limited Duty offer I signed with the USPS, signed on 11 September 2008, states that my assignment will be "Normal duties with exceptions". The argument that Judge Zamora is ignoring, and the submission by the USPS supports my argument, is that I was in a fully funded, regular employee position when the USPS sent me home. Judge Zamora mistakenly considered my position to be an unencumbered limited duty position, which it was not; I was in an encumbered position. The USPS cannot send an encumbered employee home because of "no work" without first invoking Article Six of the National Agreement with the USPS' several unions. The USPS has not invoked Article Six of the National Agreement, thus, my removal is arbitrary and Judge Zamora ignored this fact.

On page 10 of the initial decision, after Judge Zamora wrote "the duties of the position included, *inter alia,* performing janitorial duties such as cleaning … floors" and then she complained that my "sole responsibility was 'cleaning the workroom floor.'" For the record, I also mentioned that I empty trash cans. Scrubbing and waxing floors, washing walls, washing windows, washing the ceiling (which I have never observed), uncrating and assembling furniture are done on an irregular and infrequent basis whereas, cleaning floors and emptying trashcans are done every day. Clearing snow and ice, lawn care and caring for shrub are seasonal as well as being done on an infrequent and irregular basis. According the Equal Employment Opportunity Commission (EEOC), the amount of time and how often a task is done is one of the criteria for a task being an essential job function. If a task is done every day, it must be an essential duty. Job functions that are done on an infrequent basis, while still important, do not rise to the level of an essential job function. The EEOC also states that a company must take in to account any collective bargaining agreements when a company decides what an essential

function of a job is. Even if I were not an employee in an encumbered position, the board has made the decision that if the employee does not qualify for any vacant positions, the agency still is obliged to attempt to modify or adjust the duties of a position where accommodation is reasonable. Taylor v. Department of Homeland Security, 107 LRP 68363, 107 MSPR 306 (MSPB 2007). Why is it not a reasonable accommodation that I am not required to perform work that is intermittent and outside of my restrictions when I am busy doing work that is essential and within my restrictions in light of the fact that there are eight to ten custodians on duty on tour two? Judge Zamora remains silent on this question. I argued in both of my submissions that I was performing duties that must be done every day. Since I was doing tasks that are done every day, I was performing the essential duties for being a custodian.

Judge Zamora, on page 8 of the initial decision, writes "while an agency is required to 'make every effort' to restore a partially recovered employee to a position with duties within their medical restrictions that is within their commuting area, there is no absolute requirement for an agency to provide work where none exists." Judge Zamora completely rewrites my entire argument about "available work" versus "necessary work". I never, in either of my pleas, stated, or even hinted, suggested or other wise indicated, that the USPS must employ me if there is no work that I can do. I tried my best to avoid such a claim because such a claim does not hold water. My argument is that the USPS must offer me work, preferably within my craft, that I can do if the USPS is going to assign the work that I can do to a different employee while, at the same time and day, the USPS is assigning work to employees that are junior to me on the seniority list. My argument includes the idea that the work must exist for whatever reason the USPS decides that the work must be done. If the USPS calls the work "necessary" is irrelevant, it is sufficient that the work will be assigned to employee. This is what I understand to be "available work". This is the language in the relevant statutes and regulations. The reason that this is important is because there is no way for an employee, or the Board for that matter, to prove that any task or duty is "necessary". The only thing that an employee, or the Board, can prove is that a task or duty is being assigned by the USPS, which makes the task "available". Presumably, the USPS would only make a "necessary" task available, which means that the work I was performing was, and is, "necessary". Judge Zamora's interpretation of my argument was in complete error. Judge Zamora's interpretation of the ELM, the Rehabilitation Act, several other federal statutes and several other board decisions on this matter are also in error. I was arguing that the USPS must follow the ELM, the NRP, several federal statutes, specifically, the Rehabilitation Act of 1973 as amended, and the USPS' collective bargaining agreements. I did not argue that the USPS owed me a job for the sake of employing me.

On page six the initial decision, Judge Zamora writes "It is undisputed in this case that, following her on-the-job injuries, the appellant was restored to duty in various assignments which were in compliance with her medical restrictions." Judge Zamora then continues at the bottom of page eight:

> The appellant further asserts that the duties she performed remained available. AF, Tabs 1, 7, 10. She alleged that they agency had sufficient work available to occupy her for a full-time tour plus overtime. *Id.* The appellant further stated that the duties she performed must still be done

> and that, since her departure, other employees have been required to perform her work. *Id.*
>
> The appellant presented no specific evidence regarding these bare allegations. She did not identify, for instance, the specific duties she references, to whom the duties were assigned, the time required for those duties…

The claim that I did not show any proof is simply not true. I do not know how Judge Zamora overlooked the submission that I attached to my answer to the USPS' plea[1]. The attachment is a print-out from the USPS' own time keep system for routes [redacted] and [redacted], which are the two routes that I normally worked. As noted above, my duties were to clean the workroom floors. If Judge Zamora had not denied my discover request, The USPS would have produced a copy of the MS-47, which would show that routes [redacted] and [redacted] prescribe cleaning the workroom floor. If you look at the printout for routes [redacted] and [redacted] the second column from the left displays the names of the personnel assigned to each route. I plainly stated, and the print-out clearly shows, that route [redacted] takes a half-day to complete and that route [redacted] takes a half day to complete. I argued that two half day assignments makes one full day. This print out for routes [redacted] and [redacted] also shows that routes [redacted] and [redacted] are being assigned seven days a week on tour two. I did present proof of my allegations and Judge Zamora completely ignored the evidence I presented.

The premise that the USPS can "consolidate" tasks as laid out in *Soto v. U.S. Postal Service*, 115 M.S.P.R. 95 and in *Hunt v. U.S. Postal Service,* 114 M.S.P.R. 379 does not apply to custodial staff in the Maintenance craft. Soto and Hunt were mail processing clerks; I am a custodian in the Maintenance Craft. Bid assignments for mail processing clerks include specific tasks and duties that are assigned to particular bid assignments. At my pay grade, it is impossible to consolidate tasks or duties into a particular custodial position because custodial positions have no assigned tasks. The tasks and duties performed by custodial employees are not assigned to any particular bid assignment. All of the work performed by the custodians for the USPS belongs to the facility where the work is to be performed. When a custodian bids a position, they are bidding on a specific tour and specific days off, they are not bidding for a position with specific duties, except (possibly, I am not sure) for a group leader, which is a pay grade higher than my pay grade. Work done by the custodial staff is assigned based on seniority. Starting from the most senior to the most junior, custodians can take any task that is available, which is to say, any task that is on the list of work to be performed and not claimed by custodians with higher seniority. This is why I complained in my answer to the USPS' plea about custodians junior to me being assigned the work I was performing. The lack of any documentation assigning duties or tasks to a particular custodial bid position in my pay grade by the USPS is the best proof I can give that custodial positions do not have assigned tasks. My claim about seniority is supported by the USPS' submission in tab 4(f), pages 1455 and 1456 under ELM 546.132 and, more specifically, ELM 546.143(a). I also pointed out that there are more that just routes [redacted] and [redacted] that wholly contain work I can perform. Without a copy of the MS-47, I cannot state the exact route numbers.

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[1] I would have attached printout to my original plea, but I had to go through the American Postal Worker's Union to obtain this print out and I did not receive the copy until after the time for my answer to the show cause order had elapsed.

To summarize, I was in an encumbered bid position and all of the work I was performing is listed in the USPS' submission listing as some of the functions of a custodian (Tab 4(e)). To require me to find a different, vacancy bid position by the USPS is arbitrary simply because all of the custodial bid positions in my pay grade are the same with the exact same duties and none of the custodial positions at my pay grade have any assigned tasks. Judge Zamora erred when she did not consider that I was already in a bid position. Judge Zamora erred when she did not consider that all of the bid positions for custodians are the same (outside of tour and days off) at my pay grade, which she should have done given that there is no submission from the USPS showing any custodial duties being assigned to any particular custodial position. It would have been impossible for me to submit any proof that custodial positions do not have assigned tasks simply because it is impossible to produce something that does not exist. Judge Zamora erred when she found that removing me from an encumbered position without cause is not arbitrary. I have done nothing wrong and there is no documentation, medical or otherwise, that states that I cannot do the work I was being assigned. In fact, the OWCP indicates that I can do the work that I was being assigned. Judge Zamora erred when she did not consider that all of the work I was performing falls under the mantel of essential duties. Judge Zamora's determination that the USPS can consolidate custodial work into a particular position is completely wrong. You cannot consolidate duties into a position that has no assigned duties. Because the USPS is assigning work that the OWCP has determined to be within my limitations, work that is wholly within my craft, to custodians with less seniority than me, the USPS violated the ELM section 546 and, thus, the USPS did not "make every effort" to accommodate my disabilities and restore me to a position which contains essential work that I ca perform. Judge Zamora's interpretation of the decision articulated in *Yang v. U.S. Postal Service*, 115 M.S.P.R. 112, ¶ 11 (2010) runs counter to the ELM section 546 wording This misinterpretation allowed Judge Zamora to make the wrong decision that the USPS had acted consistent to the premises articulated in *Yang v. U.S. Postal Service*, 115 M.S.P.R. 112, ¶ 11 (2010). Therefore, I ask the Board to reverse Judge Zamora's decision that I did not show, with a preponderance of the evidence, that the USPS acted arbitrarily and capriciously when the USPS sent me home because of "no work".

Certificate Of Service

e-Appeal has handled service of the assembled pleading to MSPB and all of the Parties. Following is the list of the Parties in the case:

Name & Address	Documents	Method of Service
MSPB: Office of the Clerk of the Board	Petition for Review	e-Appeal / e-Mail
Thomas William Albright Appellant Representative	Petition for Review	e-Appeal / e-Mail
Ayoka Campbell Agency Representative	Petition for Review	e-Appeal / e-Mail