MARCELLA ALBRIGHT v. UNITED STATES POSTAL SERVICE
Docket # DC-0752-11-0196-I-1
Response to Appellant's Petition for Review dated 5/2/2011
Summary Page

Case Title : MARCELLA ALBRIGHT v. UNITED STATES POSTAL SERVICE

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Pleading Title : Response to Appellant's Petition for Review dated 5/2/2011

Filer's Name : Ayoka Campbell

Filer's Pleading Role : Agency Representative

Details about the supporting documentation

N/A

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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?

No

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

MARCELLA ALBRIGHT, Appellant, v. UNITED STATES POSTAL SERVICE Agency.	Docket Number: DC-0752-11-0196-I-1 Administrative Judge Sherry A. Zamora

Agency's Response to Petition for Review

Pursuant to 5 C.F.R. § 1201.114(d), the Respondent submits its response to Petitioner Albright's appeal in this case. The issue before the board is whether the Agency's failure to restore Albright to employment was arbitrary and capricious. Ms. Albright is appealing the Administrative Judge's (AJ) decision that the Agency's actions were not arbitrary and capricious.

FACTUAL AND PROCEDURAL BACKGROUND

A. Procedural Background

Ms. Albright filed her appeal of the Agency's denial of her restoration on November 20, 2010 and alleged negative suitability determination, failure to restore, and a prohibited discrimination claim. The Administrative Judge issued an Order to Show Cause on December 7, 2010. Ms. Albright filed a Response to the Order to Show Cause on December 16, 2010, and the Agency filed a Response to the Order to Show Cause on December 29, 2010. The Administrative Judge found that Ms. Albright failed to make non-frivolous allegations in support of jurisdiction. On March 30, 2011, the

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Administrative Judge issued an initial decision for the Agency, from which Ms. Albright appeals.

B. Facts

1. Postal Service's Economic Decline

The Postal Service is experiencing an unprecedented reduction in workload due to various marketplace factors. It concluded fiscal year 2008 with a decline of 9.5 billion mail pieces, or a 4.5% volume drop, compared to fiscal year 2007.AF, Tab 4(h). In fiscal year 2009, total mail volume declined more than 25 billion pieces of mail or 12.7%. AF, Tab 4(i). Its fiscal year results show a net loss of $3.8 billion. Ibid. The unprecedented 115 million, or 8.4% decrease in 2009 work hours resulted in large part from lower mail volumes. AF, Tab 4(j). the 2009 reductions were in addition to the 50 million hour reduction from 2008. Ibid. As noted in the recent press release, the losses in mail volume and revenue continued into 2010. Ibid.

As described above, whenever there is a significant drop in mail volume, there is less mail to be processed and delivered, which means there is less work to do at the Postal Service. With respect to the Appellant, the Postal Service's action was partly necessitated by the gradual and fundamental shift away from paper mail to electronic communication. Ibid. This shift has been economically beneficial for the society at large, but it has forced the Postal Service to reduce its size and operations. Ibid. From late 2008 to the present, the gradual decline in mail volume transformed into a steep decline in mail volume because of the recession. Ibid. Coupled with congressional mandates on the pre-funding of retiree health benefits and the Postal Service's

sometimes inflexible labor contracts, the Postal Service must dramatically reduce its size and costs in order to continue to function as a viable business. Ibid.

2. The NRP / NRP 2 Process

The Postal Service instituted the National Reassessment Process "NRP" to review all rehabilitation and limited duty assignments to ensure that such employees were performing operationally necessary tasks within their medical restrictions. AF, Tab 4(k).

The NRP consists of three phases. AF, Tab 4(l). Phase I focuses on the injured employee's records and requires a review and updating of these records. Ibid. The updating of the records under Phase I includes having the employee's most current medical restrictions, a recent rehabilitation work assignment offer that reflects the actual tasks being performed by the employee, verification that the employee's current work tasks comply with the employee's most recent medical restrictions, and a recent Form 50. Ibid.

The Greensboro District received authorization from the HQ team to proceed into Phase 2 on March 15, 2009. Ibid. Part 1 of Phase 2 focuses on the identification of the cumulative tasks available at each postal facility for the construction of work assignment offers. AF, Tab 4(l). Each postal facility, through its operations manager, was required to submit a worksheet of operationally necessary tasks at its respective sites. Ibid. Operationally necessary task worksheets were completed by postmasters, managers, and other designees. Ibid. Currently, the Greensboro District is reviewing all employees injured on the job, regardless of whether they have reached maximum

medical improvement. The review process determines whether they can perform operationally necessary tasks within their medical restrictions. Ibid.

3. The NRP Process

The National Reassessment Program is a national postal initiative developed and administered nationwide with the assistance of Postal Service Headquarters ("HQ") staff. It is the Postal Service's intent, under the NRP, to identify operationally necessary tasks that will comprise work assignment offers made to employees with an approved compensable injury. Although the NRP reassesses limited duty employees, not all injured employees with short term restrictions or who are physically disqualified from their former position fall within the scope of the NRP. Employees with a non-compensable injury (light duty employees) are not reassessed under the NRP. Agency File, Tab 4(c), Ricigliano Declaration at ¶5.

As part of the National Reassessment Program, each office and facility in the Greensboro District identified operationally necessary tasks ("ONTs"). These ONTs are set forth on a form entitled "Greensboro District Necessary Work Identification Worksheet". These worksheets are compiled and maintained in the Greensboro District Offices in Greensboro, North Carolina.
Agency File, Tab 4(c), Ricigliano Declaration at ¶6 & Ex. 3.

ONTs do not belong to any one employee's bid assignment but rather are additional tasks that are determined by management as necessary for an operation and/or function. Necessary tasks are office or facility specific. Each worksheet identifies such operationally necessary work and temporary vacancies that are available at that office. Agency File, Tab 4(c), Ricigliano Declaration at ¶7.

As part of the NRP, searches were conducted to determine whether there was operationally necessary work available within Ms. Albright's medical restrictions.

4. Processing of Ms. Albright under the National Reassessment Program

Appellant is a modified laborer custodial who suffered an on the job injury on April 17, 1996 [redacted], and on September 27, 2004 suffered another on the job injury [redacted]. She has been provided with a series of limited duty assignments since her return to work in 1996. Agency File, Tab 4(g).

As of August 17, 2010, appellant's physical restrictions for [redacted]:

> - lifting 3 pounds continuously and intermittently; sitting 2 hours intermittently; standing 3 hours intermittently; walking 3 hours intermittently; climbing 1 hour intermittently; kneeling 2 hours intermittently; bending and stooping 4 hours intermittently; twisting 1 to 2 hours intermittently; pulling and pushing 3 hours intermittently; simple grasping 7 hours intermittently; no reaching above shoulder; operation of machinery 2-3 hours intermittently; fume and dust 6 hours intermittently; noise 7 hours intermittently.
> Agency File, Tab 4(c), Ricigliano Declaration, Ex. 5, p. 1.

A Laborer Custodial performs duties as follow: performs manual labor in connection with maintenance and cleaning of the buildings and grounds of a postal facility. Duties include standing, walking, climbing, bending, reaching, and stooping for prolonged periods of time; able to operate power cleaning equipment. AF, Tab Agency File, Tab 4(e).

As part of the National Reassessment Program, operationally necessary tasks were identified for Raleigh, North Carolina. Agency File, Tab 4(c) Ricigliano Declaration

at ¶6 and Ex. 1. The tasks that Appellant was performing were cumulative and redundant of tasks that were performed by other full time employees in bid job or were "make work" tacks. There were no operationally necessary tasks that were available for the employee to perform. Agency File, Tab 4(c), Ricigliano Declaration at ¶6-8 & 14.

As part of the National Reassessment Program, each office and facility in the Greensboro District identified operationally necessary tasks ("ONTs"). These ONTs are set forth on a form entitled "Greensboro District Necessary Work Identification Worksheet". Agency File, Tab 4(c), Ricigliano Declaration at ¶6 and Ex. 3. The Necessary Work Identification Worksheets for the facilities in Raleigh, North Carolina, which is the employee's installation. Id.

ONTs do not belong to any one employee's bid assignment but rather are additional tasks that are determined by management as necessary for an operation and/or function. Necessary tasks are office or facility specific. Each worksheet identifies such operationally necessary work and temporary vacancies that are available at that office. Agency File, Tab 4(c), Ricigliano Declaration at ¶7.

As part of the NRP, searches were conducted to determine whether there was operationally necessary work available within the employee's medical restrictions. Agency File, Tab 4(c) Ricigliano Declaration at ¶8 and Ex. 2, 3 & 4.

There are eight basic steps to the search process, which are set forth and recorded on a Priority for Assignment Worksheet. The agency ensured that a search was conducted at each step to identify any operationally necessary work available within Ms. Albright's medical restrictions. Agency File, Tab 4(c), Ricigliano Declaration at 9.

A search was conducted to identify any available, operationally necessary work at the facility where Ms. Albright worked, which is Raleigh, North Carolina. None was available. A true and correct copy of the Priority for Assignment Worksheet for Steps 1 through 8 for Ms. Albright is attached as Ex. 1. Agency File, Tab 4(c), Ricigliano Declaration at 10 & Ex. 1, the Priority for Assignment Worksheet for Steps 1 through 8 for the employee.

If the facility indicates that there was no operationally necessary work available within an employee's restrictions, the agency was responsible for ensuring that a similar search was conducted outside the employee's facility. A search was conducted within a fifty (50) mile radius of Raleigh, North Carolina to identify any available, operationally necessary work within Ms. Albright's restrictions. None was available. Agency File, Tab 4(c), Ricigliano Declaration at 11.

A true and correct copy of the list of facilities searched within a fifty (50) mile radius of Raleigh, North Carolina is attached as Ex. 4. Most of these facilities were within the Greensboro District. However, some of the facilities were located in the Mid-Carolinas District. Agency File, Tab 4(c),Ricigliano Declaration at 12 & Ex. 2.

A search was conducted of the offices and facilities which were within the 50-mile radius and within the Greensboro District, using the Necessary Work Identification Worksheets for those facilities. A true and correct copy of the Greensboro Necessary Work Identification Worksheets regarding this search for Ms. Albright within the Greensboro District is attached as Ex. 3 & 4. Agency File, Tab 4(c), Ricigliano Declaration at 13.

A search was conducted of the offices and facilities which were within the fifty-mile radius. The search was done via email inquiry. For this purpose, the employee is not identified by name, but is assigned a search number. Ms. Albright was assigned number [redacted]. True and correct copies of the emails regarding this search for Ms. Albright are attached as Ex. 4. Agency File, Tab 4(c), Ricigliano Declaration at 14.

There was no operationally necessary work available within Ms. Albright's restrictions. Her restrictions were listed on the OWCP form CA-17, attached as Ex. 5, include:

> - lifting 3 pounds continuously and intermittently; sitting 2 hours intermittently; standing 3 hours intermittently; walking 3 hours intermittently; climbing 1 hour intermittently; kneeling 2 hours intermittently; bending and stooping 4 hours intermittently; twisting 1 to 2 hours intermittently; pulling and pushing 3 hours intermittently; simple grasping 7 hours intermittently; no reaching above shoulder; operation of machinery 2-3 hours intermittently; fume and dust 6 hours intermittently; noise 7 hours intermittently.
> Agency File, Tab 4(c) Ricigliano Declaration at 14 & Ex. 5.

There was no operationally necessary work available within the employee's restrictions as listed on the OWCP Form CA-17. Agency File, Tab 4(c), Ricigliano Declaration at 14.

On October 13, 2010, the Postal Service provided written notice to appellant that there was no operational necessary work within the employee's restrictions and she was provided instructions as to submission of leave. Agency File, Tab 4(b).

LAW AND ARGUMENT

A. Standard of Review

The review jurisdiction of the Board is extremely limited, arising only when a party can show either new and material evidence not previously discoverable, or judicial error. 5 CFR 1201.115 governs the grounds for review and provides as follows:

> (d) The Board, after providing the other parties with an opportunity to respond, may grant a petition for review when it is established that:
>
> > (1) New and material evidence is available that, despite due diligence, was not available when the record closed; or
> >
> > (2) The decision of the judge is based on an erroneous interpretation of statute or regulation.

5 CFR 1201.115(d).

B. Petitioner's Petition Must Be Dismissed Because She Alleges No New Material Facts Nor Judicial Error

The Board's regulations provide at 5 C.F.R. 1201.115 that the Board may grant a petition for review when it is established that new and material evidence is available that, despite due diligence, was not available when the record was closed, or the decision of the presiding official is based on an erroneous interpretation of statute or regulation. Because the Petition for Review makes no attempt to meet either of these criteria for granting review, it must be dismissed.

Petitioner mistakenly contends that the Administrative Judge erred because she now states (1) she was performing in her bid position, (2) that EEOC law determines the essential functions of the position, and (3) that her tasks have been assigned to other people.

However, the Petitioner does not provide any new evidence that was not available when the record closed. In fact, Ms. Albright provides contradictory evidence. Based on the "Answer to the Show Cause Order," dated December 16, 2010, Ms. Albright states that she accepted a Modified Custodian job offer due to physical limitations brought about by compensable injuries. See Appellant's Answer to Show Cause at 1. On the contrary in her appeal of the Original Decision, she now says she was in a bid position and not a limited duty position. The record is clear that Petitioner was in a Modified Custodial position at the time she was considered in the Agency's NRP process. See Agency File, Tab 4(c) and Tab 4(g). The Administrative Judge properly considered Appellant's Answer to the Show Cause Order, where she stated she was working under a limited duty offer titled "Modified Custodian." See Appellant's Answer to Show Cause at 1.

This argument simply does not constitute new and material evidence that was not available at the time the record was closed as required by the governing statues. But rather shows that the Petitioner is making contradictory statements in the effort to get the Administrative Judge's decision reversed.

The Petitioner's only argument is that she does not agree with MSPB precedent, which has found lawful the implementation of the National Reassessment Program (NRP), which provides guidance to Postal Service district personnel on how to (1) properly and individually assess each injured employee's work limitations; (2) determine the availability of suitable operationally necessary work; and (3) make these determinations in a manner that appropriately considers all lawful factors. See e.g.,

Agency File, Tab 1 (Agency's Narrative); Soto v. U.S. Postal Serv., MSPB Docket No. SF-0353-09-0574-I-1 (October 25, 2010).

The Agency determined what work was available for the Appellant during this process. See Agency File, Tab 1 (Agency's Narrative). The Board has held that the Agency has the authority to economize its operations by consolidating the necessary tasks being performed or to eliminate these tasks if deemed necessary. See Soto v. U.S. Postal Serv., at ¶ 11, citing, Hunt v. U.S. Postal Serv., 114 M.S.P.R. 379 ¶ 11 (2010). The limited duty assignments of current employees are contingent upon there being necessary and available work for them to perform in furtherance of the agency's mission. Yang v. U.S. Postal Serv., 115 M.S.P.R. 11, ¶ 11 (2010). As the Board noted in one case, "[i]t is axiomatic that an agency must determine what work is necessary and available to accomplish its mission." Boutin v. U.S. Postal Serv., 115 M.S.P.R. 241, ¶ 14 (2010). Moreover, 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 were none exists. Id. Thus, even if other employees were required to carry out the appellant's former duties, it would not constitute a nonfrivolous claim that the agency's action was arbitrary or capricious as there is no showing that the agency was obligated to continue assigning the duties to the appellant under the NRP. See Weaver v. Dep't of the Navy, 2 M.S.P.R. 12, 133-34 (1980) (appellant's repetition of her assertions that her limited duty work was operationally necessary is insufficient to establish jurisdiction).

Furthermore, as explained in the Agency's File, limited duty or modified assignments typically consist of individual tasks that are identified and combined to develop a modified assignment consistent with the employee's medical restrictions. See Agency File, Tab 1 (Agency's Narrative). A modified assignment is not equivalent of a vacant position. See e.g., Ancheta v. Office of Personnel Management, 95 M.S.P.R. 343, ¶ 14 (2003). The Appellant failed to identify any vacant available position in which she could perform all essential functions either with or without a reasonable accommodation. An agency is not required to assign a partially recovered employee limited duties that are not an essential function of her position or that do not comprise a complete and separate position. See Taber v. Dep't of Air Force, 112 M.S.P.R. 124, ¶ 14 (2009); 5 C.F.R. § 353.301(d).

Ms. Albright fails to make a non-frivolous allegation that the Postal Service acted in an arbitrary and capricious manner when it informed her that there was no operationally necessary work available for her within her medical restrictions. As discussed above, the Postal Service instituted the NRP to ensure that employees are performing necessary and productive work. Several factors in the workforce drove the need for the Postal Service to institute the NRP, including large reduction in mail volume and revenue and thus a reduction in the work available for employees. Additionally, technological increases in the ability to sort mail into delivery point sequences (DPS) have reduced the office work that is performed. Thus over the past few years, the amount and nature of the available work at Postal Stations has been changing. Because of the changes in the amount and nature of the work available, the Postal

Service implemented the NRP to ensure that employees are performing necessary and productive work.

There is no requirement that the Postal Service create work for Ms. Albright so that she can work an 8 hour day. Decreased mail volume and financial conditions and changes in the nature of work required the Postal Service to institute NRP to ensure that all employees are performing productive work. The Postal Service can no longer afford to assign "make-work" tasks to employees, especially when those tasks can be subsumed within the bid duties of a funded position.

In this case, there is no evidence in the record showing that the Agency did not search the full local commuting area for work for Ms. Albright. Rather, the record evidence shows that the Agency did search the full local commuting area and an extended area. Moreover, Ms. Albright has failed to present any evidence that there was a vacant funded position within her local commuting area that she could do within her medical restrictions. Therefore, there is no violation of restoration rights in this case.

Since Petitioner offers no new and material evidence that was available at the time the record was closed and demonstrates no judicial error, her petition must be denied.

/s/
AYOKA A. CAMPBELL
Attorney
Capital Metro Law Office
United States Postal Service

V. CONCLUSION

For the reasons set forth above, we respectfully request that this tribunal affirm the Initial Decision of the Board.

Respectfully submitted,

/s/
AYOKA A. CAMPBELL
Attorney
Capital Metro Law Office
United States Postal Service
2901 Scott Futrell Drive
Charlotte, NC 28228-9910
704-424-4512 - phone
704-424-4524 – fax
Ayoka.A.Campbell@usps.gov

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	Response to Appellant's Petition for Review dated 5/2/2011	e-Appeal / e-Mail
Marcella Albright Appellant	Response to Appellant's Petition for Review dated 5/2/2011	e-Appeal / e-Mail
Thomas William Albright Appellant Representative	Response to Appellant's Petition for Review dated 5/2/2011	e-Appeal / e-Mail