UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 111

Docket No. DC-0752-10-0120-C-1

Michael C. Milner,

Appellant,

v.

United States Postal Service,

Agency.

September 25, 2012

Michael C. Milner, Chesterfield, Virginia, pro se.

Gail A. Nettleton, Esquire, Landover, Maryland, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of a compliance initial decision that denied his petition for enforcement of a final Board order. For the reasons set forth below, we find that the agency has not complied with the Board's prior order, and therefore ORDER the agency to establish its compliance with that order.

BACKGROUND

¶2 The agency placed the appellant on enforced leave from his position as a City Letter Carrier at the Pocoshock Creek Station after receiving correspondence

from the appellant's treating psychologist stating that he may pose a danger to others in the workplace. Initial Appeal File (IAF), MSPB Docket No. DC-0752-10-0120-I-1 (I-1), Tab 7 at 32-34, 54, 110. On appeal, the Board reversed the action on the basis that the agency violated the appellant's due process rights. *Milner v. U.S. Postal Service*, MSPB Docket No. DC-0752-10-0120-I-2, Final Order at 4 (July 8, 2011). The Board ordered the agency to return the appellant to duty with back pay. *Id*. at 4-5. The appellant submitted to a fitness-for-duty examination at the agency's direction, and once the appellant was cleared for duty, the agency returned him to work in a limited duty assignment at a different location, the Richmond Main Post Office. Compliance Appeal File (CAF), Tab 6 at 28-30; Tab 7 at 24-25. The appellant filed a petition for enforcement, and the administrative judge issued a compliance initial decision finding the agency in compliance. CAF, Tab 1, 11.

ANALYSIS

¶3 The appellant has filed a petition for review of the compliance initial decision, arguing that the agency is not in compliance with the Board's order. Specifically he argues: (1) The agency improperly required him to report for a fitness-for-duty examination before allowing him to return to work; and (2) the agency placed him in a different position than the one he might have held if he were never suspended. Compliance Petition for Review File, Tab 1 at 2-3.

¶4 An issue is moot when there is no effective relief that the Board can provide. *Allen v. Department of Veterans Affairs*, 110 M.S.P.R. 111, ¶ 3 (2008); *Uhlig v. Department of Justice*, 83 M.S.P.R. 29, ¶ 77 (1999). Here, the appellant already reported for the fitness-for-duty examination and was found fit for duty. Thus, the fitness-for-duty examination issue is moot because the Board can no longer grant the appellant any effective relief as to this matter.[1]

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[1] Even if the agency did not have the authority to order the appellant to undergo a psychiatric fitness-for-duty examination, as *Doe v. Pension Benefit Guaranty*

¶5 However, we find that the agency has not demonstrated compliance with the Board's order that the appellant be restored. *Milner*, MSPB Docket No. DC-0752-10-0120-I-2, Final Order at 4. Instead of restoring the appellant to his former City Letter Carrier position at the Pocoshock Creek Station, the agency reassigned the appellant out of his bid assignment and placed him in a limited duty assignment at the Richmond Main Post Office. CAF, Tab 8 at 12, 18. In its response to the petition for enforcement, the agency justified its action by explaining that it could not return the appellant to his former bid assignment because his old route at Pocoshock no longer exists. CAF, Tab 6 at 6. The agency further explained that, because the appellant's medical restrictions allow him to case, but not deliver mail, its best chance for finding him a full day's work was to place him in a limited duty assignment in the larger Richmond Main Post Office facility. *Id*. at 7.

¶6 The appellant argues that, but for his suspension, he would have been entitled to bid pursuant to the applicable collective bargaining agreement on the junior Pocoshock carriers' routes after the agency abolished his former assignment. CAF, Tab 8 at 5. We agree and find that the appellant has not been returned to the status quo ante.

¶7 This is not a matter of harmless procedural error, as the compliance initial decision suggests; the agency's decision to deny the appellant his contractual rights based on his medical condition violates the Americans with Disabilities Act's (ADA)[2] restrictions on preemployment disability-related inquiries.[3] *See* 42

Corporation, 117 M.S.P.R. 579, ¶¶ 24-34 & n.10 (2012) may suggest, that alone is insufficient to convert this moot issue to a live one.

[2] As a federal employee, the appellant's claim arises under the Rehabilitation Act of 1973, but the regulatory standards for the ADA have been incorporated by reference into the Rehabilitation Act and are applied to determine whether there has been a Rehabilitation Act violation. 29 U.S.C. § 791(g); *Bennett v. U.S. Postal Service*, 118 M.S.P.R. 271, ¶ 10 n.3 (2012); 29 C.F.R. § 1614.203(b).

U.S.C. § 12112(d); 29 C.F.R. § 1630.14; EEOC Enforcement Guidance, § B. When, as in this matter, the agency is already aware of the appellant's medical condition, it must take precautions to prevent the application and job offer process from being tainted by these matters, and under no circumstances may it use such information to prevent the appellant from bidding for assignments along with everyone else. *See* EEOC Enforcement Guidance, § B.4 & n.37. The agency cannot use the occasion of the appellant's unlawful suspension simply to place him in an assignment of its own choosing. Even if the appellant is ultimately unable to perform the essential functions of any of the junior Pocoshock City Letter Carriers' routes, he must be allowed to bid on other assignments in accordance with his seniority under the applicable collective bargaining agreement. If the appellant is the winning bidder on any of those assignments, only then will it be appropriate to determine whether the appellant will be able to perform the essential functions of the position at issue, with or without reasonable accommodation.

ORDER

¶8 Accordingly, we ORDER the agency to submit to the Clerk of the Board within 20 days of the date of this Order satisfactory evidence of compliance with this decision. The agency's submission must include proof that it reconstructed the bidding process that should have occurred when the appellant's former bid assignment was abolished, and that the reconstructed bidding process is in

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[3] A "disability-related inquiry" is a question or series of questions that is likely to elicit information about a disability. Equal Employment Opportunity Commission (EEOC), "Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)," Notice No. 915.002, § B.1 (July 27, 2000) (Enforcement Guidance). Whether the appellant is actually "disabled" within the meaning of the ADA Amendments Act of 2008, which became effective on January 1, 2009, is immaterial because the restrictions regarding disability-related inquiries and medical examinations apply to all employees – not just to those with disabilities. *See generally Addison v. Department of Veterans Affairs*, EEOC DOC 0120081932, *3 (2012).

accordance with the applicable collective bargaining agreement. The agency must serve all parties with copies of its submission.

¶9 We also ORDER the agency to identify the individual who is responsible for ensuring compliance and file the individual's name, title and mailing address with the Clerk of the Board within five days of the date of service of this Order. This information must be submitted even if the agency believes that it has fully complied with the Board's Order. If the agency has not fully complied, it must show cause why sanctions, pursuant to 5 U.S.C. § 1204(a)(2) and (e)(2)(A) and 5 C.F.R. § 1201.183, should not be imposed against the individual responsible for the agency's continued noncompliance.

NOTICE TO THE APPELLANT

¶10 You may respond to the agency's evidence of compliance within 15 days of the date of service of that evidence. If you do not respond, the Board will assume you are satisfied and will dismiss the petition for enforcement as moot.

FOR THE BOARD:

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