UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 97

Docket No. DA-0432-12-0484-I-1

David B. White,

Appellant,

v.

Department of Veterans Affairs,

Agency.

December 12, 2013

David B. White, San Antonio, Texas, pro se.

Jeffrey T. Reeder, Esquire, Austin, Texas, 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 an initial decision that affirmed the agency's action reducing him in grade for unacceptable performance. For the reasons discussed below, we conclude that the petitioner has not established any basis under 5 C.F.R. § 1201.115 for granting the petition for review. We therefore DENY the petition for review and AFFIRM the agency's reduction in grade action.

BACKGROUND

¶2 The appellant served as a GS-9 Veterans Service Representative in Waco, Texas. Initial Appeal File (IAF), Tab 6, Subtab 4FF. In late February 2011, his supervisor advised him that he was failing to meet the Output critical element of his performance standards and placed him on a 90-day performance improvement plan (PIP).[1] *Id.*, Subtab 4GG. In a memorandum issued on May 13, 2011, prior to the end of the 90-day period, the agency advised the appellant that he had successfully completed the PIP, but warned him that he would need to maintain his successful performance for one year from the beginning of the PIP, and that failure to do so could result in an action to remove, reassign, or demote him without benefit of another PIP. *Id.*, Subtab 4DD.

¶3 On April 20, 2012, the agency proposed to demote the appellant based on his unacceptable performance on the Output critical element within one year of the inception of the PIP. *Id.*, Subtab 4T. The supporting evidence indicated that, during the 10-month period from May 2011 through February 2012, the appellant's average weighted actions per day was less than 1.0 (this critical element required 4.5 average weighted actions per day). *Id.*[2] Four days after the agency issued its proposal notice, the appellant filed a request for accommodation in which he cited several medical conditions and stated that he was seeking reassignment and a change in his work shift. IAF, Tab 6, Subtab 4Q. In its response on May 3, 2012, the agency stated that it lacked sufficient information

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[1] The PIP notice is dated February 25, 2011, but discusses a meeting that occurred on February 22, and indicates that the PIP will end after "90 days have passed or after May 23, 2011."

[2] The agency promoted the appellant from GS-7 to GS-9 soon after the appellant successfully completed the PIP. IAF, Tab 6, Subtab 4FF. Although the GS-9 position has a higher Production requirement than the GS-7 position, *id.*, Subtab 4GG, the agency applied the lower GS-7 Production element in taking its reduction in grade action.

to make a determination as to an accommodation and requested that the appellant provide medical and other information. *Id.*, Subtab 4P. On May 18, 2012, the agency issued a decision demoting the appellant to a GS-5/6 Claims Assistant effective June 3, 2012. *Id.*, Subtabs 4B & 4H.

¶4 On appeal to the Board, the administrative judge issued an initial decision affirming the appellant's reduction in grade. The judge found, among other things, that the agency proved by substantial evidence that the action was effected under a performance appraisal system approved by the Office of Personnel Management (OPM), that the appellant's performance standards were valid, that the standards were clearly communicated to the appellant and he was notified that his performance was unacceptable in at least one of the critical elements of his position, and that the appellant was provided a reasonable opportunity to improve and failed to do so. Initial Decision (ID) at 4-10. The judge further found that the appellant failed to establish discrimination on the basis that the agency failed to accommodate his disability, that the agency violated his right to minimum due process of law, or that the action should be reversed because the agency committed harmful procedural error. *Id.* at 10-16.

ANALYSIS

The agency complied with the Office of Personnel Management's regulations for addressing unacceptable performance by employees.

¶5 In a performance-based action under chapter 43, an agency must establish by substantial evidence that: (1) OPM approved its performance appraisal system; (2) the agency communicated to the appellant the performance standards and critical elements of his position; (3) the appellant's performance standards are valid under 5 U.S.C. § 4302(b)(1); (4) the agency warned the appellant of the inadequacies of his performance during the appraisal period and gave him a reasonable opportunity to improve; and (5) the appellant's performance remained unacceptable in at least one critical element. *Henderson v. National Aeronautics & Space Administration*, 116 M.S.P.R. 96, ¶ 9 (2011); *Lee v. Environmental*

Protection Agency, 115 M.S.P.R. 533, ¶ 5 (2010). Substantial evidence is the "degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree." 5 C.F.R. § 1201.56(c)(1). As described in the preceding paragraph, the administrative judge found, and the appellant does not dispute on review, that the agency met the first three elements of its burdens of proof and that the appellant's performance on the Output critical element was unacceptable during the period between his successful completion of the PIP and the issuance of the proposed reduction in grade. The appellant, however, argues that the agency committed harmful procedural errors that deprived him of a reasonable opportunity to improve, and he reiterates his contention that the agency committed disability discrimination by failing to accommodate his medical impairments. Petition for Review (PFR) File, Tab 1.

¶6 OPM regulations and Board case law have long recognized what is required to provide a reasonable opportunity to improve to an employee whose performance is unacceptable until the PIP, improves during the PIP, but shortly thereafter deteriorates and again becomes unacceptable. *See Sullivan v. Department of the Navy*, 44 M.S.P.R. 646, 656 (1990). OPM's regulation provides that: (1) once an employee has been afforded a reasonable opportunity to improve, an agency may propose a reduction in grade or removal action if the employee's performance "during or following" the PIP is unacceptable in one or more of the critical elements involved in the PIP; (2) if an employee who has been placed on a PIP performs acceptably for 1 year (starting with the commencement of the PIP), he is entitled to a new PIP if his performance again becomes unacceptable; and (3) a proposed reduction in grade or removal may be based on instances of unacceptable performance that occur within a 1-year period

ending on the date of notice of proposed action. *See* 5 C.F.R. § 432.105(a)(1)-(3).[3]

¶7 The agency complied with these rules in the present case. As the administrative judge found, from February 2011 - February 2012, the appellant met his production standards in only three of twelve months. IAF, Tab 22 at 8. Because the appellant did not perform acceptably on the Production critical element for 1 year following the commencement of the PIP, he was not entitled to a new PIP; the appellant's performance on the Production critical element became unacceptable following his successful completion of the PIP; and the instances of unacceptable performance on the Production critical element cited by the agency in its proposal notice occurred during the 1-year period (April 20, 2011 to April 20, 2012) ending on the issuance of the notice of proposed action. The appellant's contention on review that the agency's reduction in grade action was improper because the April 2012 proposal notice was not issued until more than a year after the commencement of the PIP in February 2011 is undermined by the record evidence of his poor performance during the year following the commencement of his PIP. *See* PFR File, Tab 1 at 5.

The appellant has failed to show that the agency's performance-based action was improper on the basis that it was based on performance during a detail.

¶8 On review, the appellant asserts that the agency cannot effect a performance-based demotion based on an employee's performance during a detail, and asserts that he was on a detail on the "Nehmer" project during the

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[3] In promulgating these provisions, OPM stated that it was clarifying that "employees may be subject to removal or reduction in grade if acceptable performance demonstrated during the opportunity to improve is only short-term or temporary," and stated its belief that it was "strik[ing] a balance between the needs of agencies for an efficient and effective work force and the rights of employees to a reasonable chance to demonstrate they can overcome serious performance deficiencies." 54 Fed. Reg. 26172, 26177 (1989).

period in question. PFR File, Tab 1 at 5. In rejecting this contention below, the administrative judge relied on a supervisor's testimony that the Nehmer project was the result of a court case that required adjudication of claims of deceased veterans based on their exposure to Agent Orange, and that the quantity of work on this project was evaluated through the regular automated system and daily tracking sheets. ID at 5. The record thus indicates that employees on the Nehmer project were not on a detail; they were doing their normal jobs but on a specific group of cases. The appellant has not pointed to any evidence that employees assigned to this project were less able than other employees to meet the Output critical element of their performance standards.

The appellant did not establish that the agency discriminated against him by failing to accommodate his disability.

¶9 An agency is required to make a reasonable accommodation to the known physical and mental limitations of an otherwise qualified individual with a disability unless the agency can show that accommodation would cause an undue hardship on its business operations. 29 C.F.R. § 1630.9(a). Reasonable accommodation includes modifications to the manner in which a position is customarily performed in order to enable a qualified individual with a disability to perform the essential job functions. Equal Employment Opportunity Commission (EEOC) Notice No. 915.002, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act* (2002) (EEOC Guidance).[4] In order to establish disability discrimination, an

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[4] This guidance can be accessed at the EEOC public website: http://www.eeoc.gov/policy/docs/accommodation.html. As a federal employee, the appellant's claim of disability discrimination arises under the Rehabilitation Act. However, the standards under the Americans with Disabilities Act (ADA) have been incorporated by reference into the Rehabilitation Act. 29 U.S.C. § 791(g). Further, the ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified at 42 U.S.C. §§ 12101 et seq.), applies to this appeal because the incidents in question occurred after the January 1, 2009 effective date of the ADAAA. Although the

employee must show that: (1) he is an individual with a disability, as defined by 29 C.F.R. § 1630.2(g); (2) he is a qualified individual with a disability pursuant to 29 C.F.R. § 1630.2(m); and (3) the agency failed to provide a reasonable accommodation. *Emory v. Jackson*, Appeal No. 0120112078, 2013 WL 3435860, *9 (E.E.O.C. June 27, 2013).

¶10 In finding that the appellant failed to establish his affirmative defense of disability discrimination, the administrative judge found, among other things, that: (1) the appellant is an individual with a disability; (2) although the appellant requested a different shift or a reassignment to a position in San Antonio as a reasonable accommodation for his medical conditions, he conceded that no physician ever told him he needed to work a different shift or at a different location in order to perform his job successfully, and he never provided any documentation stating that he needed to be moved to a different shift or duty station; (3) although the appellant claimed that the agency could have reassigned him to other positions, he did not allege that any such positions were vacant; and (4) the appellant failed to provide the information requested by the agency in response to his request for reasonable accommodation. ID at 11-12. The administrative judge also cited with approval agency witnesses' testimony regarding the lack of vacancies to which the appellant could have been reassigned. On review, the appellant disputes the judge's finding that he failed to adduce evidence of positions to which he could have been reassigned that would have accommodated his disability. PFR File, Tabs 1 and 4.

¶11 We agree with the administrative judge's determination that the appellant is an individual with a disability as defined by 29 C.F.R. § 1630.2(g), i.e., a physical or mental impairment that substantially limits one or more of his major

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ADAAA changed the interpretation of the law with respect to the existence of a disability, it did not affect the requirements of the law as to reasonable accommodation. *See Davis v. U.S. Postal Service*, 119 M.S.P.R. 22, ¶ 11 n.4 (2012).

life activities. The question of whether an individual's impairment is a covered disability should not demand extensive analysis. 29 C.F.R. part 1630 Appendix. Assuming without deciding that the appellant also established that he is a qualified individual with a disability under 29 C.F.R. § 1630.2(m), i.e., that he can perform the essential functions of his position with or without reasonable accommodation, we conclude, as discussed below, that the appellant failed to establish that the agency violated its duty of reasonable accommodation because the appellant failed to fulfill his obligations in the interactive accommodation process.

¶12 An accommodation is "reasonable" if it "seems reasonable on its face, i.e., ordinarily or in the run of cases," i.e., if it appears to be "feasible" or "plausible." EEOC Guidance (General Principles section). While an individual with a disability may request a modification to the work environment or adjustments in how and when a job is performed due to a medical condition, this request does not necessarily mean that the employer is required to provide the requested modification or adjustment. A request for reasonable accommodation is the first step in an informal, interactive process between the individual and the employer. *Id.* (Q&A item 1). The employer may ask the individual relevant questions that will enable it to make an informed decision about the request. *Id.* (Q&A item 5). This includes asking what type of reasonable accommodation is needed. *Id.* When the disability and/or the need for accommodation is not obvious, the employer may ask the individual for reasonable documentation about his disability and functional limitations. *Id.* (Q&A item 6). The employer is entitled to know that the individual has a covered disability for which he needs a reasonable accommodation. *Id.* Where the existence or nature of a reasonable accommodation is not obvious, and the employee fails to respond to the employer's reasonable request for medical information or documentation, an agency will not be found to have violated its duty to provide a reasonable accommodation. *See Howerton v. McHugh*, Appeal No. 0120113177, 2013 WL

3149195, *3-4 (E.E.O.C. June 12, 2013) (no showing that the agency failed to reasonably accommodate the employee's disability where the employee did not provide evidence that the accommodation he requested would have been effective in accommodating his attendance issues); *Miller v. Shinseki*, Appeal No. 0120110565, 2013 WL 2368677, *2-3 (E.E.O.C. May 22, 2013) (no showing that the agency failed to reasonably accommodate the employee's disability where, among other things, the employee failed on two occasions to provide sufficient medical documentation to support her accommodation request).

¶13 When the appellant requested an accommodation on April 24, 2012, he cited several conditions, including sleep apnea, insomnia, hypertension, ulcers, post-traumatic stress disorder, and back conditions, and he included numerous items of medical documentation with his request. IAF, Tab 6, Subtab 4Q. In its May 3 response to the appellant's request, the agency's Reasonable Accommodation Committee stated that it needed additional information before it could act on the appellant's request for accommodation. *Id.*, Subtab 4P. It noted that the appellant's medical documentation did not identify essential duties he was unable to perform because of his conditions, nor the position(s) to which he desired to be reassigned. *Id.* The Committee noted that it had not received a request from the appellant for a shift change. *Id.* It further observed that the appellant had responded to a December 2011 request for volunteers interested in rotating to teams on a daytime shift, but that employees with more seniority were selected, and that the appellant had not responded to a February 2012 request for volunteers to work on the same shift. *Id.* The appellant did not reply to the agency's May 3 response.

¶14 We find that the agency's response to the appellant's request for accommodation was reasonable and appropriate under the circumstances. Whether and the degree to which the appellant's ability to perform the essential duties of his position was adversely affected by his medical conditions, and whether or how a modification to his work duties or schedule or a reassignment

would have enabled him to better perform those duties were not obvious and had not been addressed in the medical documentation he provided with his request for accommodation. Unless and until the appellant provided the requested information and documentation, the agency could not be expected to modify the appellant's work duties or schedule or to reassign him to another position, and the agency could not be said to have failed to satisfy an obligation to provide a reasonable accommodation. That being the case, the existence or absence of vacant positions to which the appellant could have been reassigned does not affect the correct disposition of the appellant's claim of disability discrimination.[5]

¶15 In addition to the request for accommodation he filed on April 24, 2012, the appellant asserted below and refers in his petition for review to three requests for a "hardship transfer" to San Antonio as previous occasions on which he had requested accommodation for his disabilities. *See* IAF, Tab 6, Subtab 4EE (Jan. 31, 2011 request), Subtab 4Z (Aug. 5, 2011 request), and Subtab 4W (Jan. 5, 2012 request). The appellant's first two requests for hardship transfer could not be considered requests for accommodation because they did not mention any medical condition from which he suffered; they focused on the hardship caused to his family by their separation (the appellant was working in Waco, while his wife and children were living in San Antonio). The final request cited the same concerns, but also stated that the appellant was "[e]xperiencing personal problems and medical at current duty station" and that, as "outline[d] in my last request need to be closer home to help with sick child and take care of my own

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[5] We note in this regard that reassignment is the reasonable accommodation of last resort, which is only required after it has been determined that there are no effective accommodations that will enable the employee to perform the essential functions of his current position, or that all other reasonable accommodations would impose an undue hardship. EEOC Guidance (Q&A item 24).

medical needs." *Id.*, Subtab 4W. In context, it is understandable that the agency did not view or treat the appellant's third request for a hardship transfer as a request for reasonable accommodation.[6] Like the first two requests, the third request focused on the hardship created by the appellant's separation from his family. Although the third request also mentioned a personal medical condition (but did not describe it), it did so in the context of implying that the appellant would be better able to manage that condition if reunited with his family. The appellant gave no indication in this request that he needed or wanted any sort of accommodation in order to perform his job duties. Accordingly, we find no basis for concluding that the agency committed disability discrimination by failing to grant the appellant's January 2012 request for a hardship transfer.

The appellant did not establish that the agency violated his right to minimum due process of law or engaged in harmful error by failing to afford him an oral reply to the agency's proposed demotion.

¶16 The appellant submitted a written reply to the proposed demotion. IAF, Tab 6, Subtab 4N. The appellant alleged that the agency violated his right to minimum due process of law or engaged in harmful error by failing to afford him an oral reply to the agency's proposed adverse action. In rejecting these claims, the administrative judge found, among other things, that the appellant failed to prove that he in fact requested an oral reply and that, even if the deciding official had considered his oral reply, it would not have changed the official's decision. ID at 12-14.

¶17 On review, the appellant contends that an agency supervisor's testimony supported his contention that he requested an oral reply, and asserts that he

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[6] We note that a request for accommodation need not be in writing, but the employee must generally inform the employer that an accommodation is needed. EEOC Guidance (General Principles section and Q&A item 3). The appellant has not cited any conversations he had with supervisors prior to his request of April 24, 2012, in which he advised them that he needed an accommodation for his medical conditions.

emailed the supervisor and another individual requesting an oral reply. PFR File, Tab 1 at 4. The supervisor's testimony does not support the appellant's contention in this regard. He testified that the appellant never requested official time to present an oral response to the proposal notice. IAF, Tab 19 (Hearing Compact Disc). He further testified that he had discussions with the appellant about 16 hours that the appellant was requesting for official time in which to prepare his written and oral responses, but that the appellant never followed through on those discussions. *Id.*

¶18 As for the appellant's contention that he emailed the supervisor and other officials with a request for an oral response, he has produced a copy of an email he sent to the supervisor and two other agency officials on April 24, 2012, in which he stated: "I need 16 Hrs[.] The first day will on Monday the day before present an written reply and next will be the day before I do a oral reply." PFR File, Tab 4 attachment. Even if this email is properly before the Board, *see* 5 C.F.R. § 1201.115(d),[7] it does not establish that the agency denied the appellant's request for an oral reply. The primary focus of the email was a request for official time to prepare written and/or oral responses, and neither the proposing official nor the deciding official was among the recipients. If the appellant wanted to make an oral response to the proposal to demote him, it was incumbent on him to make an unequivocal request of the deciding official to afford him one. There is no evidence that the appellant did so.

¶19 The appellant also complains that he had only 3 days in which to reply to the proposal notice because the agency gave him two separate proposal notices. PFR File, Tab 1 at 4. The appellant's contention in this regard is incorrect. The

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[7] This email was included in a 208 page pleading that the administrative judge rejected on the day of the hearing because, despite being given the opportunity to do so, the appellant had not clearly labeled the documents and they were not easily identified by his table of contents. ID at 15 n.8; IAF, Tab 19.

agency did not issue two proposal notices. In his written response to the notice of proposed demotion, the appellant stated that he had asked his manager about the agency's Employee Assistance Program (EAP), but that he received very little feedback. IAF, Tab 6, Subtab 4N. In a memorandum issued on May 11, 2012, the deciding official responded that the agency had provided him information about its EAP program, and provided further information.[8] *Id.*, Subtab 4K.

¶20 In sum, the appellant has not established that the agency violated his right to minimum due process in effecting his demotion, or that the agency deprived him of required agency procedures in connection with his written or oral reply.

The appellant has failed to show that the judge abused her discretion in refusing to approve two witnesses.

¶21 The appellant contends that the administrative judge denied him two witnesses who he felt "were critical to my request for reasonable accommodation." PFR File, Tab 1 at 3. The administrative judge denied the appellant's request for these witnesses on the ground that "their proffered testimony was deemed to be cumulative to that of other approved witnesses or was not relevant to the accepted issues in this appeal." IAF, Tab 14 at 5 n.7. The judge's order directed that a party disagreeing with her rulings must file a written objection within one week. *Id.* at 6. The record does not indicate that either party filed such an objection. The appellant's failure to timely object to rulings on witnesses precludes his doing so on petition for review. *Tarpley v. U.S. Postal Service*, 37 M.S.P.R. 579, 581 (1988).

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[8] The appellant asserts on review that the agency "fail[ed] to exhaust all reasonable possibilities (EAP) in providing assistance they fail[ed] to follow the plan for improvement . . . " PFR File, Tab 1 at 5. The appellant's conclusory statement in this regard fails to provide a basis for modifying, vacating, or reversing the initial decision.

ORDER

¶22 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request review of this final decision on your discrimination claims by the Equal Employment Opportunity Commission (EEOC). *See* Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). If you submit your request by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit your request via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, NE
Suite 5SW12G
Washington, D.C. 20507

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

FOR THE BOARD:

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