

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS REGIONAL OFFICE**

REYNALDO ALVARA,
Appellant,

DOCKET NUMBER
DA-0752-10-0223-I-1

v.

DEPARTMENT OF HOMELAND
SECURITY,
Agency.

DATE: December 1, 2010

Gary M. Gilbert, Esquire, Ari M. Wilkenfeld, Esquire, and Julie E. Rook,
Esquire, Silver Spring, Maryland, for the appellant.

Lamont D. Nahrgang, Esquire, and Peter Arcuri, Esquire, El Paso, Texas,
for the agency.

BEFORE

Anna M. Love
Administrative Judge

INITIAL DECISION

On January 26, 2010, Reynaldo Alvara filed an appeal from the decision of the Department of Homeland Security, United States Customs and Border Protection (CBP), which removed him from his Customs and Border Protection Officer (CBPO) position, effective January 7, 2010, for physical inability to meet the conditions of his employment due to a medical condition. The Board has jurisdiction over this timely filed appeal pursuant to 5 U.S.C. §§ 7511-7513. At the appellant's request, a hearing was held.

Based on the following analysis and findings, the agency's action is **AFFIRMED**.

ANALYSIS AND FINDINGS

Background and undisputed facts

Most of the facts in this case are not in dispute. *See* Appeal File (AF), Tab 21.¹ From February 21, 2007 through January 7, 2010, the appellant held the position of CBPO, GS-1895-11, at the Port of El Paso, Texas.² *See* AF, Tab 7b at 80-88 (for the CBPO position description) and 89-102 (for the CBPO medical standards and physical requirements). According to the CBPO's medical standards and physical requirements, a CBPO:

is a “frontline” uniformed border security weapon-carrying position. The primary function of the position is to detect and prevent terrorists and instruments of terror from entering the United States and to enforce customs, immigration and agriculture laws, while at the same time facilitating the orderly and efficient flow of legitimate trade and lawful travelers. . . .

Due to the unique function of the job, the Officer may work extended or unscheduled hours including weekends and holidays and be required to rotate shifts, assignments and duty stations. . . .

AF, Tab 7b at 89, 91 (emphasis added). The CBPO position description states that, one of the “Special Requirements” for the position is that the incumbent “[m]ust work on a shift and rotational basis and perform substantial amounts of overtime.”³ AF, Tab 7b at 84.

¹ The parties may stipulate to any matter of fact, and that stipulation satisfies the burden of proving that fact. 5 C.F.R. § 1201.63 (2010).

² The Port of El Paso consists of four bridges that connect the U.S. with Mexico: Stanton Street Bridge, Bridge of the Americas (BOTA), Ysleta Bridge, and Paso Del Norte (PDN) Bridge. Hearing Compact Disk (HCD), AF, Tab 27 (William H. Molaski).

³ Prior to sometime in 2009, CBPOs at the Port of El Paso were assigned to work one of five different shifts: 6:00 a.m. to 2:00 p.m., 8:00 a.m. to 4:00 p.m., 2:00 p.m. to 10:00 p.m., 4:00 p.m. to 12:00 a.m. (midnight), and 12:00 a.m. (midnight) to 8:00 a.m. HCD (Michael John Brady). At the time of the hearing, Port of El Paso CBPOs were assigned to three shifts: 6:00 a.m. to 2:00 p.m., 2:00 p.m. to 10:00 p.m., and 10:00 p.m. to 6:00 a.m. *Id.*

The appellant suffers from sleep apnea. *See id.* at 41-44. On February 15, 2008, his physician opined that, due to his sleep apnea, the appellant could not work the graveyard shift.⁴ *See id.* at 41. On March 3, 2008, Acting Port Director Arthur Gonzales offered the appellant four options concerning his employment: return to full duty, request reasonable accommodation, apply for disability retirement, or resign. *Id.* at 38. On April 10, 2008, the appellant requested reasonable accommodation based on his sleep apnea.⁵ *Id.* at 30-31. In his request, he wrote the following in relevant part:

I am requesting that I not be assigned Mid-night Shift 2400-0800 due to the Fact that I have trouble Staying awake during the night shift. I am afraid that if I fall asleep During the shift I will stop breathing. I also have difficulty Driving after working a night shift.

Id. at 30 (capitalization, spacing and grammar as in the original).⁶

The appellant submitted additional medical documentation, which reflected that he should not work the graveyard shift, he must use a Continuous Positive Airway Pressure (CPAP) machine while he sleeps for the rest of his life, and he should get at least eight hours of nocturnal sleep so that his performance during the day is not compromised. *See id.* at 22, 33. On July 21, 2008, Acting Equal Employment Opportunity (EEO) Manager Norma Martinez advised the Acting

⁴ The 12:00 a.m. (midnight) to 8:00 a.m. shift is referred to as the graveyard shift. HCD (Brady).

⁵ As a Federal employee, the appellant is covered by the Rehabilitation Act of 1973. However, the regulatory standards for the Americans with Disabilities Act (ADA) have been incorporated by reference into the Rehabilitation Act and the Board applies them to determine whether there has been a Rehabilitation Act violation. 29 U.S.C. § 791(g); *Simpson v. U.S. Postal Service*, 113 M.S.P.R. 346, ¶ 8 (2010).

⁶ The appellant has also been diagnosed with Post Traumatic Stress Disorder (PTSD). AF, Tab 7b at 40. On June 20, 2008, the appellant informed Acting Equal Employment Opportunity Manager Norma Martinez that he also wanted to be reasonably accommodated because of his PTSD but, on July 18, 2008, he withdrew that request. *See* AF, Tab 7b at 3, 7, 29.

Port Director, William H. Molaski,⁷ she had determined that the appellant had not shown he was disabled and, therefore, his request for a reasonable accommodation should be denied. *Id.* at 3-6. Thereafter, on August 9, 2008, Molaski denied the appellant's request for reasonable accommodation. *See* AF, Tab 7a at 103-04.

On September 29, 2008, Molaski recommended that a removal action be initiated against the appellant. *Id.* at 101. On January 5, 2009, Acting Port Director Norman A. Bebon proposed the appellant's removal for physical inability to meet the conditions of his employment due to a medical condition.⁸ *Id.* at 93-95.

On January 30, 2009, the appellant again requested a reasonable accommodation.⁹ *Id.* at 88-90. He asserted that his PTSD contributed directly to his sleep apnea, "which substantially limits the major life activity of sleeping." *Id.* at 88. He stated that, with a reasonable accommodation, he would be able to perform all the essential functions of his CBPO position. *Id.* at 88. He further related the following in relevant part:

I, Reynaldo Alvara request that due to my disability and doctor's restriction that I be afforded "at least 8 hours of nocturnal sleep," the Agency modify my work hours to accommodate this restriction and my impairment. I would then be able to work regular hours and some overtime. This request entails I "be allowed at least two additional hours on each end" of the "8 hours for nocturnal sleep" to prepare daily for work, travel to work, travel home, and prepare to sleep. This modification could easily be accomplished through my

⁷ Molaski was the Acting Port Director for the Port of El Paso from June 2008 until the early part of November 2008. He became the permanent Port Director on January 8, 2009. HCD (Molaski).

⁸ Bebon served as the Acting Port Director for the Port of El Paso for one or two weeks in January 2009. HCD (Bebon).

⁹ The Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) (ADAAA) became effective on January 1, 2009.

being assigned to work daily shifts between the hours of 0600-1800 hours or 0800-2000 hours or 1000-2200 hours. These suggested shifts coincide with existing shifts and still afford me the opportunity to obtain “8 hours of nocturnal sleep,” work, and even work some overtime without causing an undue hardship to the Agency. . . .

Id. at 89 (grammar and punctuation as in the original). In support of his request for reasonable accommodation, the appellant provided medical documentation that said he needed eight hours of nocturnal sleep and that his conditions of obstructive sleep apnea and sleeping disorders due to his PTSD are expected to last the rest of his life. *See id.* at 76-80.

On February 10, 2009, the appellant responded both orally and in writing to the notice of proposed removal. *See id.* at 81-87. In his written reply, the appellant, through the National Treasury Employees Union (NTEU or the union), reiterated his request that the agency modify his work hours. *Id.* at 83. He said that his requested job modification could be accomplished by assigning him permanently to work “daily shifts between the hours of 6 a.m.- 6 p.m. or 8 a.m.- 8 p.m. or 10 a.m.-10 p.m. hours at any El Paso Field Office location.” *Id.* at 83-84 (spacing as in the original). He also suggested that he could be reassigned to the “Bridge of the Americas Cargo Lot, [the] Dedicated Commuter Lane Enrollment Center, or the Dedicated Commuter Lane at Stanton Bridge.” *Id.* at 84.

On March 24, 2009, Norma Martinez advised Molaski, who was the Port Director by then, that the appellant had shown he was disabled and she recommended that his request for an accommodation be approved. *See id.* at 67-69. Martinez noted that the Job Accommodation Network (JAN) consultant had opined that the appellant’s medical restrictions precluded an accommodation in his current position and recommended that he be reassigned to another position.¹⁰ *Id.* She stated that the agency must attempt to accommodate the

¹⁰ JAN is a free consulting service provided by the Department of Labor’s Office of Disability Employment Policy. AF, Tab 7a at 69, n.4. JAN provides individualized

appellant “by reassigning him to a vacant-funded position for which he is qualified to perform with or without reasonable accommodation.” *Id.* Martinez said a local job search would be performed to identify vacant, funded positions in the local commuting area and, if no such positions were identified, the appellant would be asked whether he wished the job search to be extended to other geographical areas. *Id.*

On April 8, 2009, Molaski informed the appellant that the agency had approved his January 30, 2009 request for reasonable accommodation. *See id.* at 64-66. Molaski noted, however, that the appellant’s CBPO position required him to work rotating shifts as well as to perform substantial amounts of overtime and, therefore, the agency could not approve the accommodation he was seeking. *Id.* at 65. Rather, because his medical conditions precluded him from performing the essential functions of his CBPO position, either with or without accommodation, the agency would attempt to accommodate him by reassigning him to a vacant funded position. *Id.* Molaski advised the appellant that the agency would conduct a job search in the local commuting area and, if no job was found, he would be asked if he wanted the agency to extend the search. *Id.* The appellant was instructed to submit updated information regarding his qualifications to Mission Support Specialist Janice Lybarger.¹¹ *Id.*

On April 27, 2009, the appellant asked Molaski to reconsider his request for accommodation in his current CBPO position. *See id.* at 62-63. On May 28, 2009, Molaski informed the appellant that the agency would not modify his current position’s schedule and work assignments to “specific special assignments.” *Id.* at 59-61. On or about July 28, 2009, Molaski advised the

worksite accommodation solutions and technical assistance regarding the ADA and other disability related legislation. *Id.*

¹¹ *See* AF, Tab 7a at 54-58 for the appellant’s updated Optional Application for Federal Employment, OF-612.

appellant that no vacant, funded positions for which he qualified had been found in the local commuting area. *Id.* at 45. Molaski asked the appellant for permission to expand the job search for a vacant, funded position outside of the local commuting area. *Id.* The appellant denied the agency's request to expand the search outside the local commuting area. *See id.* at 42. On September 1, 2009, Molaski informed the appellant that the agency had discontinued processing his request for a reasonable accommodation. *Id.*

In a letter dated January 5, 2010, Ana Hinojosa, the Director of Field Operations for the El Paso Field Office,¹² advised the appellant that she had decided to remove him from his CBPO position due to "physical inability to meet condition of employment due to a medical condition." *Id.* at 39-41. Hinojosa informed the appellant that his removal would be effective upon receipt of the letter. *Id.* The appellant received a copy of Hinojosa's letter on January 7, 2010. *Id.* at 41. His removal was effective on January 7, 2010. *Id.* at 38.

The appellant filed the instant appeal. AF, Tab 1. He asserted that the agency discriminated against him when it failed to accommodate his disability. *See* AF, Tabs 20-21. The appellant also claimed that, in removing him, the agency retaliated against him for engaging in protected EEO activity when he requested accommodation. *Id.*

Burdens of Proof

The agency has the burden to prove the merits of its case by preponderant evidence. 5 C.F.R. § 1201.56(a)(1) (2010). Preponderant evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c)(2) (2010). In addition, the agency must show that the penalty it selected was within the bounds of reasonableness and promotes

¹² The El Paso Field Office encompasses El Paso, New Mexico, and parts of West Texas including Fort Hancock, Fabens and Presidio. HCD (Hinojosa).

the efficiency of the service. *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 302 (1981). The appellant has the burden to prove his affirmative defenses by preponderant evidence. 5 C.F.R. § 1201.56(a)(2) (2010).

The agency has shown that the appellant is physically unable to meet the conditions of his employment due to a medical condition.

A charge of inability to perform job duties is equivalent to a charge of medical incapacity, and it requires medical evidence showing that the employee is incapacitated for particular job duties due to a medical condition. *Ellshoff v. Department of the Interior*, 76 M.S.P.R. 54, 68-69 (1997). In a removal action for physical inability to perform, the Board must determine whether the employee was able to perform the functions of his position, and whether the agency considered accommodation. *See Schoening v. Department of Transportation*, 34 M.S.P.R. 556, 561 (1987); *D'Leo v. Department of the Navy*, 53 M.S.P.R. 44, 51 (1992).

According to the medical standards and physical requirements, as well as the position description for a CBPO, the appellant was expected to work extended or unscheduled hours including weekends and holidays; was required to rotate shifts, assignments and duty stations; and was obliged to perform substantial amounts of overtime. *See AF, Tab 7b at 84, 89, 91.* Based on the medical evidence contained in the record as well as the undisputed facts, including the parties' stipulations, I find that the appellant was unable due to his and sleep apnea¹³ to work rotating shifts, specifically the graveyard shift. The parties stipulated during the hearing that no one is exempt from working the graveyard shift. HCD (Brady). I also find that the appellant was unable to work all of the overtime to which he might have been assigned. Accordingly, I find that the agency has proven by preponderant evidence that the appellant was physically

¹³ The appellant claimed that his PTSD contributed directly to his sleep apnea. AF, Tab 7a at 88.

unable to meet the conditions of his employment due to a medical condition. Moreover, as will be discussed in detail below concerning the appellant's disability discrimination defense, I find that the agency considered accommodation. *See Schoening*, 34 M.S.P.R. at 561; *D'Leo*, 53 M.S.P.R. at 51. Therefore, the agency's charge is sustained.

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

A removal action is unlawful if it is based on a prohibited personnel practice, including a violation of the Rehabilitation Act.¹⁴ 5 U.S.C. § 7701(c)(2)(B); 5 U.S.C. § 2302; *Lloyd v Small Business Administration*, 96 M.S.P.R. 518, ¶ 6, *review dismissed*, 110 F. App'x 127 (Fed. Cir. 2004). The appellant asserted that the agency discriminated against him by failing to accommodate his disability. To meet his burden of proof regarding this affirmative defense, the appellant must establish not only that he has a disability but he must also show that he was a qualified individual with a disability. In addition, the appellant must also articulate to the extent possible a reasonable accommodation under which he believes he could perform the essential duties of his position or of a vacant funded position to which he could be reassigned. *See Combs v. Social Security Administration*, 91 M.S.P.R. 148, 159 (2002). After the appellant has established a prima facie case of disability discrimination based on failure to accommodate, the burden shifts to the agency to demonstrate that reasonable accommodation would impose an undue hardship on its operations. If the agency meets its burden, the burden shifts back to the appellant to show that the agency's reasons are a pretext for discrimination. Ultimately, the appellant has the burden of proving by preponderant evidence that he was denied

¹⁴ As was discussed above, *supra* note 5, the regulatory standards for the ADA have been incorporated by reference into the Rehabilitation Act and the Board applies them to determine whether there has been a Rehabilitation Act violation. 29 U.S.C. § 791(g); *Simpson*, 113 M.S.P.R. 346, ¶ 8.

reasonable accommodation and, therefore, his removal was unlawful. *See Simpson v. U.S. Postal Service*, 113 M.S.P.R. 346, ¶ 16 (2010). An agency's failure to reasonably accommodate a qualified disabled person constitutes disability discrimination. *See Trammell v. Department of Veterans Affairs*, 60 M.S.P.R. 79, 85 (1993).

Pursuant to the ADA, a disability means, with respect to an individual, a physical or mental impairment that substantially limits one or more major life activities; a record of such an impairment; or being regarded as having such an impairment. 42 U.S.C. § 12102(1)(A), 29 C.F.R. § 1630.2(g) (2010). The ADAAA, which became effective on January 1, 2009, did not change the definition of disability but it did express Congress' intent to construe the definition in favor of broad coverage. P.L. 110-325, § 2(a)(7), (a)(8), codified at 42 U.S.C. § 12101 Note. Here, the parties stipulated that the appellant satisfies the definition of a person with a disability. Moreover, after reviewing the record in its entirety, I find that the appellant has an impairment that substantially limits the major life activity of sleeping.¹⁵ Hence, I find the appellant has met his burden of proving he has a disability.

The ADAAA also did not change the statutory provision regarding reasonable accommodation. P.L. 110-325, § 6(h); *Simpson*, 113 M.S.P.R. 346, ¶ 13. An agency must provide reasonable accommodation to the known limitations of a qualified individual with a disability unless to do so would create an undue hardship. 42 U.S.C. §§ 12112(a), (b)(5)(A); 29 C.F.R. § 1630.9; *Simpson*, 113 M.S.P.R. 346, ¶ 13. A qualified individual with a disability is a person with the skills, experience, education and other job-related requirements of the employment position such individual holds and who, with or without reasonable accommodation, can perform the essential functions of such position.

¹⁵ The ADAAA added sleeping to the list of major life activities. *See* P.L. 110-325, § 4(a), codified at 42 U.S.C. § 12102(2)(A).

42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m) (2010); *Simpson*, 113 M.S.P.R. 346, ¶ 13. Reasonable accommodation may entail modifications to the person's current position or reassignment to a vacant position. 42 U.S.C. § 12111(9); 29 C.F.R. § 1630.2(o) (2010); *Simpson*, 113 M.S.P.R. 346, ¶ 13.

Here, the appellant has consistently asked that his disability be accommodated by allowing him to modify his CBPO work schedule so that he can get "at least 8 hours of nocturnal sleep." He requested not to be assigned to the graveyard shift and that he only work a limited amount of overtime. The appellant did not testify at the hearing.

Michael John Brady, CBP Chief Officer for the Port of El Paso, testified at the hearing that the Port of El Paso is a 24-hour, seven-day per week, operation. He related that, in order to run the Port, CBPOs are assigned to work around-the-clock shifts. He said CBPOs change shifts every two weeks/pay period and that they are permitted to "swap" shifts. Brady noted that one of the shifts to which CBPOs are assigned is the graveyard shift. He indicated that shift assignments are made using the "base minimum" number of CBPOs expected to be needed on each shift. However, because CBPOs may be absent due to training, leave, or because of an emergency or unexpected need, additional CBPOs will be assigned to work overtime to meet the needs of the agency on any shift, including the graveyard shift. He added that CBPOs are often ordered to come back to work overtime even after they have gone home. HCD.

Brady testified that working overtime is a "condition of employment" and, in order for the agency to fulfill its mission, all CBPOs are expected to be available to work every shift and assignment, all the time. Brady explained that overtime is assigned starting with the first job going to the lowest earner, and so forth. He indicated that two to three times per pay period, a CBPO will be ordered to work overtime and that frequently CBPOs are ordered to work "on a double," that is, 16 straight hours including eight hours of overtime. He stated that, if the appellant was only able to work two hours of overtime per shift, but a

CBPO was needed for longer than two hours, the agency would have to call someone else in to replace the appellant. HCD.

Brady pointed out that CBPOs are subject to a \$35,000.00 annual overtime pay cap and, therefore, Congress requires the agency to make assignments in the most cost effective manner possible. Brady said that 25% of CBPOs reach the overtime cap and that the rest of them finish close to the cap. He related that, since he started with the agency in 1976, he has never seen a CBPO permanently exempted from working overtime or the graveyard shift. He added that he has seen it happen on a temporary basis but that was only when there was a reasonable expectation that the CBPO would eventually return to full duty. Brady opined that, if a CBPO was exempt from working overtime and the graveyard shift, the morale of the other CBPOs would be affected since they would have to “pick up the slack.” Brady noted that, if the appellant was not required to work the graveyard shift, a lot more CBPOs would have to be ordered to work overtime to fill the void. He said this would hurt the agency’s mission since the agency can neither exceed its budget nor reduce services to the public. HCD.

Brady testified that, if a CBPO is unable to work a particular overtime assignment, another CBPO will have to be assigned to work it. Brady opined that CBPO morale would be “destroyed” if some CBPOs were not required to work overtime. He said he receives complaints all the time from CBPOs about other CBPOs who are not working overtime because, for example, they are on light duty. He emphasized that working overtime is an essential function of a CBPO’s job and that CBPOs perceive it as unfair and resent it when they have to work more overtime than they think they should because someone else is not working. Brady related that, if all CBPOs were not required to work overtime, it would impair the agency’s ability to fulfill its duty to the nation, which includes managing its funds. HCD.

Molaski testified that there are approximately 640 to 650 non-supervisory CBPOs assigned to the Port of El Paso. Molaski remembered that, in June or July 2008, the new Director of Field Operations, Ana Hinojosa, held a meeting where she expressed concern that so many CBPOs were on light duty. He said there were 90 CBPOs on light duty at that time. He indicated that this represented a significant number of employees who were unavailable to work. He opined that morale can be affected when so many officers are not capable of working the full range of duties because the work does not stop and, therefore, they have to back fill for the unavailable CBPOs, including assigning CBPOs to work more overtime. HCD.

Molaski recalled that Hinojosa wanted to come up with a system to deal with and track the CBPOs who were on light duty. He said she assigned a person to monitor the light-duty situation and to report back to her. He indicated that they attempted to reduce the number of CBPOs on light duty by creating a matrix; tracking reporting requirements; and monitoring doctors' notes. He testified that their goal was to make sure that CBPOs on light duty would not be forgotten. Molaski added that, to ensure they were properly accommodating the CBPOs on light duty, they requested doctors' notes regarding each person's restrictions. He remembered that, because CBPOs on light duty were not allowed to perform the full range CBPO duties, management attempted to find "non-officer" functions for each of them to perform until the matter was resolved. Molaski said EEO would identify whether the person had a disability and, if so, EEO would conduct a job search. He noted, however, that each CBPO's situation was handled on a case-by-case basis. Molaski indicated that CBPOs with permanent restrictions that impinged on their ability to perform their CBPO duties were treated differently than those with temporary restrictions. He related that the decision whether a CBPO's condition was permanent, and required accommodation, was made by the Port Director in conjunction with EEO after considering the limitations described by the person's physician. HCD.

Molaski recalled that he recommended that the agency propose the appellant's removal because the appellant's physician's medical evaluation indicated that his condition was permanent and did not allow him to perform all the required functions of his position. He explained that due to the appellant's sleep apnea and PTSD, he was permanently limited in the number of hours he could work each day and he also could not work the midnight shift. Molaski pointed out that, when he recommended that they propose the appellant's removal, the appellant was on a light-duty status. HCD.

Molaski remembered that the appellant requested to be accommodated by only working specific day shifts with limited overtime. He testified that he forwarded the appellant's accommodation request to Martinez, the EEO Manager, and that he and Martinez discussed the appellant's situation several times. He indicated that he also discussed what the essential functions of the job were with Labor and Employee Relations employees, Jeff Clay and Irene Ramirez. Molaski said they concluded that the appellant had a disability that would not allow him to work "24/7," and that he could not be accommodated in his CBPO position. He explained that CBPOs are required to work shifts and unpredictable overtime and that these are essential functions of the position. Molaski opined that, if they granted the appellant his requested accommodation, it would affect the operational or mission requirements of the agency. He emphasized that it could also affect services and be detrimental to security because more work would be placed on the other CBPOs. He stated that, because the Port of El Paso is a "24/7" operation, all CBPOs must be available for all functions all the time. He indicated that, if one CBPO is put on a set schedule, it would impact how the other CBPOs are scheduled and, therefore, could also affect CBPO morale. HCD.

Molaski testified that no CBPOs in the El Paso Field Office are permanently exempt from working the graveyard shift or overtime and, to his knowledge, none are permanently exempt from the graveyard shift or overtime in Arizona, Miami, California, or at John F. Kennedy Airport in New York. He

added that, although there are some CBPO assignments at the commercial cargo facilities in El Paso that are not “24/7,” those assignments last for only one year and then the CBPOs all bid again. Moreover, Molaski said there is no such thing as permanent light duty. HCD.

On cross-examination, Molaski acknowledged that CBPOs are freely able to “swap” shifts and that he did not know how often they could do that. He said he would not know if a CBPO always swapped off of the graveyard shift and he added that this would not affect the agency’s mission or national security. Molaski conceded that, “from time to time,” some CBPOs are excused from working the graveyard shift. He agreed that a CBPO who is breast feeding may be excused from working the graveyard shift for possibly two years and that this would not compromise the agency’s mission or national security. Molaski also acknowledged that a female CBPO who was pregnant and then breast fed her child could, with proper documentation, be excused from working the graveyard shift for years and this would not impact national security or the agency’s mission. Molaski further conceded that a CBPO could be temporarily excused from working the graveyard shift for “personal convenience,” such as to care for a sick family member. He indicated that, to his knowledge, the agency does not have a written policy regarding the maximum amount of time a person can be excused from the graveyard shift and that it was left to his discretion as the Port Director. Moreover, Molaski related that he was unaware of any studies that showed that CBPOs would leave in droves if other CBPOs were exempt from working the graveyard shift. HCD.

Molaski testified that he ultimately made the decision that the appellant could not be accommodated and that he told Martinez this. He said he “misspoke” during his deposition when he said he was not involved in that process.¹⁶ He related that, prior to his deposition, did not even know what the

¹⁶ See AF, Tab 20, Exhibit C, page 21.

ADA was. Molaski indicated that, in making the decision that the appellant could not be accommodated, he did not consider the number of CBPOs who were available to perform the same tasks. He further acknowledged that he did not consider asking the other CBPOs if anyone wanted to volunteer to swap shifts with the appellant and he added that it would not have been a burden to do so. He also conceded that there is nothing in the CBPO position description that says CBPOs must be available “24/7.” In addition, he agreed that there was nothing in the collective bargaining agreement that would affect his ability to exempt the appellant from working the graveyard shift. HCD.

Norman A. Bebon testified that he was the Acting Port Director for several weeks in January 2009, and that he proposed the appellant’s removal because the appellant was unable to work all of the required shifts and overtime. Bebon opined that CBPOs must be available to work all shifts, assignments and overtime. He said he could not recall a CBPO who was permanently exempt from working overtime or the graveyard shift but he added that he had seen it happen for short periods of time. HCD.

Janice Lybarger testified that she works as a Mission Support Specialist and that, from July 2008 through August 2009, she was on detail to the Light Duty/Limited Duty Program. She recalled that, when the appellant requested a reasonable accommodation, she was involved in the job search process. She indicated that, when the appellant was approved for a reasonable accommodation, he was told to submit an updated OF-612 or a resume to be used during the search process. Lybarger recalled that the appellant submitted a new OF-612,¹⁷ and that she forwarded it to the Minneapolis Hiring Center for them to conduct the job search. She stated that the Minneapolis Hiring Center subsequently advised her via email that there were no vacant positions for the appellant in the El Paso area. Lybarger said she personally verified that all of the CBP entities in El Paso were

¹⁷ See AF, Tab 7a at 54-58.

checked and, thereafter, she prepared the letter for Molaski that indicated there were no vacancies.¹⁸ She recalled that they asked the appellant in that letter if he wanted them to expand the search to other areas and gave him a deadline to do so. She said they advised the appellant that, if he did not respond by the deadline, they would assume he was not interested in an expanded search beyond the local commuting area. HCD.

Lybarger testified that, during her detail, she placed eight to ten CBPOs in alternate positions. Specifically she recalled that, at about the same time they conducted the job search for the appellant, they got a negative search result for another CBPO. She added that, at that CBPO's request, an expanded job search was conducted and a job was found for him in Dallas. Lybarger conceded that transfer to another position was an accommodation of last resort. She related that she has never seen a CBPO permanently exempted from overtime or the graveyard shift but that CBPOs on light duty had been temporarily exempted. HCD.

Norma Martinez testified that she is currently employed by CBP as the Diversity and Civil Rights (DCR) Officer and when managers say they contacted "EEO," they are talking about her. Martinez explained that the DCR Officer works for "Headquarters" and, therefore, is not physically located in the Field Office. She said her relationship with the "field" is that she gives advice, does counseling, and provides training. She indicated that in 2008, she was the Acting EEO Manager and was responsible for "emphasis programs," handling reasonable accommodation requests, and collecting data. HCD.

Martinez recalled that in late January 2009, she received a request from the appellant to reasonably accommodate his PTSD¹⁹ and sleep apnea by placing him

¹⁸ See AF, Tab 7a at 45.

¹⁹ The appellant asserted that his PTSD contributed directly to his sleep apnea. AF, Tab 7a at 88.

on a set schedule working 12-hour shifts and/or by assigning him to a specific work location.²⁰ She related that, as part of the “interactive dialogue,” she gave the appellant a copy of his position description along with a letter for his doctor that contained various questions that needed to be answered.²¹ She stated that, after reviewing the appellant’s doctor’s answers, she concluded that the appellant had a disability. Martinez said she discussed the matter with Molaski and that Molaski indicated that the appellant could not be accommodated by assigning him to a specific shift or location because CBPOs are required to work rotating shifts and assignments. She added that Molaski opined that to accommodate the appellant as requested would be detrimental to the operational and mission requirements of the agency as well as national security.²² HCD.

Martinez testified that, per the CBPO position description, the core/main duties of a CBPO require availability for shift work and substantial amounts of overtime. She explained that, because the appellant could not work the graveyard shift or extended overtime, he was not “qualified” to be accommodated in his CBPO position since he could not perform the essential functions of that position with or without accommodation. She, therefore, determined that he could only be accommodated by reassigning him from his CBPO position. Martinez further related that she contacted JAN concerning the appellant and that the JAN technical advisor also recommended that the agency reasonably accommodate the appellant by finding him another job. HCD.

Martinez conceded that neither she nor anyone else from her office conducted an “undue hardship” analysis concerning the appellant and she did not take into account how many other CBPOs were available to perform the functions

²⁰ See AF, Tab 7a at 88-90.

²¹ See AF, Tab 7a at 78-80.

²² See AF, Tab 7a at 74-75.

the appellant could not. She acknowledged that she did not know how one employee not working the graveyard shift affected national security but she added that she left that up to Molaski. Martinez indicated that, other than not being able to work the graveyard shift and substantial amounts of overtime,²³ she was unaware of any other criticism regarding the appellant's performance. She said she knew that the appellant was on light duty for approximately nine months and that, during that time, he was not required to work the graveyard shift. She acknowledged that she did not check to see whether national security was affected during those nine months. HCD.

Hinojosa testified that, when she became the Director of Field Operations for the El Paso Field Office in May 2008, the Field Office was in "a bit of turmoil." She said she wanted to ensure that they were properly using their employees. She discovered that there were a large number of employees on light duty and the process they were using to manage those employees was not consistent. Hinojosa said she was concerned because a large of number of those employees had been on light duty for a very long time and management had not been following up on the employees' progress. She further related that management also was not getting medically acceptable evidence from the employees. She added that, if an employee was never going to be able to return to full duty, then they needed to be reassigned and/or transferred. Hinojosa indicated that she changed the way the Field Office handled light duty. HCD.

Hinojosa testified that, as the deciding official in the appellant's case, she was aware that he requested accommodation by not being required to work the graveyard shift and extended overtime. She said it was not feasible to grant the appellant's requested accommodation because it was a condition of employment that a CBPO work varying shifts and overtime in all sorts of inclement

²³ She recalled that the appellant said he could work 12-hour shifts but he did not want to have to work a 16-hour shift. HCD.

conditions. She noted that those requirements went into the process of classifying and grading the CBPO position. Hinojosa opined that to grant the appellant's accommodation would impose a significant burden on the agency; undermine the position itself; and impact every other officer's classification. She added that, if those were not conditions of employment for a CBPO, the agency could not do its job. HCD.

Hinojosa explained that it is an essential function of the CBPO position that the officer be able to work varying shifts and any overtime that the agency needs him to work. She testified that most ports of entry are "24/7" operations and that, to accomplish the agency's mission, they have to be able to staff and schedule employees so that CBPOs are available to work all shifts at all border crossings. She indicated that CBPOs can be ordered to work overtime because of an unexpected increase in volume in border crossings; an increased number of enforcement actions; and employee absences. She opined that a permanent exemption from those essential functions would have a negative impact on the agency. She noted that employees can take leave and trade shifts but that controls were in place so that the agency can still accomplish its mission. Hinojosa recalled a union-hall meeting where the union expressed concern that some employees were being granted exemptions from working overtime and that other employees were being required to work overtime in their place. She opined that to grant the appellant's requested accommodation would affect employee morale as well as the agency's effectiveness. Hinojosa stated that, if the agency had to reduce the level of work because of a lack of manpower, the agency would not be able to accomplish its mission. HCD.

Hinojosa testified that the collective bargaining agreement imposes limits on how much overtime each employee can be ordered to work. She explained that, because there were not enough volunteers to work overtime, they needed to ensure that employees get some rest before having to come back to work again. Hinojosa stated that the appellant's requested accommodation would circumvent

the collective bargaining agreement since every other CBPO was subject to its provisions. On cross-examination Hinojosa conceded that she did not specifically mention the collective bargaining agreement in her decision letter because it was an “implied concept.” She also acknowledged that she did not mention it during her deposition.²⁴ Hinojosa added that she believed that the union would like the agency to modify a number of conditions of employment for CBPOs including overtime issues. HCD.

Hinojosa related that she was unaware of any other CBPO anywhere in the agency who had been granted a permanent accommodation similar to the one requested by the appellant. She added that there was no such thing as permanent light duty. When Hinojosa was told what Molaski had testified concerning the breast-feeding CBPO, she said she disagreed with Molaski’s testimony. She indicated that pregnant CBPOs are placed on light duty until they deliver and may also remain on light duty for a short time after that. Hinojosa noted that women breast feed 24 hours a day and, therefore, she would not grant a blanket exemption from working the graveyard shift for a breast-feeding CBPO. She added, however, that, with proper medical documentation showing an expected end date, she might grant an exemption for a limited period of time. HCD.

Hinojosa testified that any accommodation request is addressed on a case-by-case basis in light of the medical documentation provided. She said that every accommodation request is looked at individually and that in each case the agency considers how the request will affect its overall mission. Hinojosa related that temporary exemptions from working the graveyard shift are granted and she conceded that the agency “survives” when they are granted. She explained that the overtime assignment methodology allows for temporary exclusions from working overtime but there is always the expectation that the employee will return to working overtime and will have to make up the overtime he did not

²⁴ See AF, Tab 20, Exhibit A at 31-33.

work. She noted that the lowest earners are the first to be assigned overtime. Hinojosa conceded that the appellant suggested that he be assigned to 12-hour shifts with overtime during the first and last two hours of each shift. She noted, however, that the appellant was assuming that overtime would always be needed during his suggested hours and that would not always be so.

After considering the record in its entirety, I find that all of the witnesses testified that working rotating shifts and significant amounts of overtime were essential functions of the CBPO position. In addition, both the CBPO's medical standards and physical requirements and the CBPO position description provide that CBPOs work rotating shifts and the position description clearly states that CBPOs perform substantial amounts of overtime. *See* AF, Tab 7b at 84, 89, 91. Moreover, the Equal Employment Opportunity Commission (EEOC) held in *Bouffard v. Michael Chertoff, Secretary, Department of Homeland Security (U.S. Customs and Border Protection)*, EEOC Appeal # 0120065257 (Jan. 16, 2008), that the ability to work rotational shifts and overtime was an essential function of the CBPO position. Accordingly, I find that the ability to work rotational shifts and overtime was an essential function of the appellant's CBPO position

Here, it is undisputed that the appellant could not work rotating shifts and unlimited overtime. I find that the accommodation the appellant requested, namely not having to work rotational shifts and overtime, is in essence a request to change the essential functions of his job as a form of reasonable accommodation. I find, therefore, that the appellant was not a qualified individual with a disability because he could not perform the essential functions of his CBPO position with or without accommodation.²⁵

²⁵ Although I need not reach the issue of whether providing the appellant's requested accommodation would impose an undue hardship on the agency, in *Cyr v. Michael Chertoff, Secretary, Department of Homeland Security*, EEOC Appeal # 01A43015 (July 13, 2005), the EEOC found that providing a permanent day shift to an Immigration Inspector would impose an undue hardship on the agency.

That said, the reasonable accommodation of reassignment to a vacant funded position is an accommodation of last resort. Here, it is unquestioned that the agency conducted a search for a vacant funded position in the El Paso commuting area and that no vacancies were found. It is also undisputed that the agency asked the appellant if he wanted the job search to be extended outside of El Paso and that he did not agree to an expanded search. The appellant has the evidentiary burden to establish that it more likely than not there were vacancies to which he could have been assigned. The appellant failed to tender any evidence to that effect. Thus, I find that the appellant has failed to identify any reasonable accommodation that would have allowed him to continue working for the agency. Accordingly, the appellant has not shown that the agency engaged in disability discrimination and, therefore, this affirmative defense must be denied.

The appellant did not establish that the agency retaliated against him for engaging in protected EEO activity.

To establish a prima facie case of retaliation for engaging in protected activity, the appellant must show that: (a) he engaged in protected activity; (b) the accused official(s) knew of the protected activity; (c) the adverse employment action under review could, under the circumstances, have been retaliation; and (d) there was a genuine nexus between the protected activity and the adverse employment action. *See Warren v. Department of the Army*, 804 F.2d 654, 656-58 (Fed. Cir. 1986); *Cloonan v. U.S. Postal Service*, 65 M.S.P.R. 1, 4 (1994). To establish a genuine nexus between the protected activity and the adverse employment action, the appellant must prove that the employment action was taken because of the protected activity. *Cloonan*, 65 M.S.P.R. at 4, n.3. If the appellant meets this burden, the agency must show that it would have taken the action even absent the protected activity. *See Rockwell v. Department of Commerce*, 39 M.S.P.R. 217, 222 (1989).

Here, the appellant asserted that the agency retaliated against him because he requested an accommodation. Assuming *arguendo* that this was protected

activity, that the proposing and deciding officials knew about his protected activity, and that his removal could, under the circumstances, have been retaliation, the appellant must also prove that there was a genuine nexus between the removal and his request for an accommodation. The appellant has failed to present any evidence to show that his removal was taken because he requested an accommodation. His mere assertion that his removal was taken in retaliation for his protected EEO activity is insufficient to constitute a *prima facie* case. See *Romerov. Equal Employment Opportunity Commission*, 55 M.S.P.R. 527, 539 (1992), *aff'd*, 22 F.3d 1104 (Fed. Cir. 1994) (Table).

Moreover, as with most appeals of adverse actions taken under 5 U.S.C. Chapter 75, such as in the instant case, the agency has articulated a nondiscriminatory reason for its action, *i.e.*, the appellant's physical inability to meet the conditions of his employment due to a medical condition. Accordingly, I find that the agency has done everything that would be required of it if the appellant had made out a *prima facie* case of retaliation. See *Marshall v. Department of Veterans Affairs*, 111 M.S.P.R. 5, ¶ 16 (2008). I find, however, that the appellant has not met his overall burden of proving illegal retaliation. See *id.* He failed to produce sufficient evidence to show that the agency's proffered reason was not the actual reason for his removal and that the agency intentionally retaliated against him. See *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507-08, (1993); *Marshall*, 111 M.S.P.R. 5, ¶ 17. Therefore, this affirmative defense must fail.

Efficiency of the service

An agency may take a disciplinary action only for such cause as to promote the efficiency of the service. 5 U.S.C. § 7512. The efficiency of the service is the ultimate criterion for determining whether any disciplinary action is warranted and whether the particular sanction may be sustained. *Street v. Department of the Army*, 23 M.S.P.R. 335, 342 (1984). Where an appellant was unable to perform the duties of his position because of a physical disability, the Board has found

that the appellant's removal promoted the efficiency of the service because a clear and direct relationship existed between the grounds for the action and the appellant's ability to accomplish his duties satisfactorily. *Marshall-Carter v. Department of Veterans Affairs*, 94 M.S.P.R. 518 (2003), *aff'd*, 122 F. App'x 513 (Fed. Cir. 2005); *Woodhouse v. U.S. Postal Service*, 29 M.S.P.R. 98, 100 (1985). In this case, I find the appellant is not able to perform the duties of a CBPO. Thus, I find that the agency's action promotes the efficiency of the service.

The penalty is reasonable.

The final matter that I must determine is the reasonableness of the penalty. The agency must show that the removal penalty was appropriate and reasonable under the circumstances. In this regard, the Board will review the penalty to determine whether it is clearly excessive, disproportionate to the sustained charge, or arbitrary, capricious or unreasonable. *Douglas*, 5 M.S.P.R. at 306. The Board will modify an agency's penalty only if the Board finds that the agency failed to weigh the relevant factors or that the agency's judgment clearly exceeded the limits of reasonableness. *Howard v. U.S. Postal Service*, 72 M.S.P.R. 422, 427 (1996); *Barry v. Department of the Treasury*, 71 M.S.P.R. 283, 285-87 (1996).

The charge of physical inability to meet the conditions of his employment due to a medical condition has been sustained. The Board has held that an employee's non-disciplinary removal based on such a charge is reasonable. *See Casillas v. Department of the Air Force*, 64 M.S.P.R. 627, 630, 633-34 (1994); *Kimble v. U.S. Postal Service*, 47 M.S.P.R. 251, *aff'd*, 945 F. 2d 417 (Fed. Cir. 1991) (Table). Accordingly, I find the removal penalty is reasonable and the agency's action is affirmed.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD:

/S/ _____
 Anna M. Love
 Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **January 5, 2011**, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. You must establish the date on which you received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Equal Employment Opportunity Commission (EEOC) or with a federal court. The paragraphs that follow tell you how and when to file with the Board, the EEOC, or the federal courts. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.,
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (<https://e-appeal.mspb.gov>).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you claim that you received this decision more than 5 days after its issuance, you have the burden to prove to the Board the date of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or e-mail is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. If the petition is filed by e-mail, and the other party has elected e-Filing, including the party in the address portion of the e-mail constitutes a certificate of service.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION REVIEW

If you disagree with the Board's final decision on discrimination, you may obtain further administrative review by filing a petition with the EEOC no later than 30 calendar days after the date this initial decision becomes final. The address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20036

JUDICIAL REVIEW

If you do not want to file a petition with the EEOC, you may ask for judicial review of both discrimination and nondiscrimination issues by filing a civil action. If you are asserting a claim under the Civil Rights Act or under the Rehabilitation Act, you must file your appeal with the appropriate United States district court as provided in 42 U.S.C. § 2000e-5. If you file a civil action with the court, you must name the head of the agency as the defendant. *See* 42 U.S.C. § 2000e-16(c). To be timely, your civil action under the Civil Rights Act, 42 U.S.C. § 2000e-16(c) must be filed no later than 30 calendar days after the date this initial decision becomes final. If you are asserting a claim under the Age Discrimination in Employment Act, your claim must be filed with the appropriate United States district court as provided in 29 U.S.C. § 633a(c). In some, but not all districts you may have up to 6 years to file such a civil action. *See* 28 U.S.C. § 2401(a).

If you choose not to contest the Board's decision on discrimination, you may ask for judicial review of the nondiscrimination issues by filing a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.