



## U.S. MERIT SYSTEMS PROTECTION BOARD

### **Case Report for August 15, 2014**

#### **BOARD DECISIONS**

**Appellant:** Reynaldo Alvara  
**Agency:** Department of Homeland Security  
**Decision Number:** [2014 MSPB 63](#)  
**MSPB Docket Number:** DA-0752-10-0223-E-1  
**EEOC Petition No.** 032011005  
**Issuance Date:** August 13, 2014  
**Appeal Type:** Removal  
**Action Type:** Physical Inability to Perform

#### **Special Panel Certification Under Mixed Case System Essential Functions of Law Enforcement Position Reasonable Accommodation**

The appellant was removed from his GS-11 Customs and Border Protection Officer (CBPO) position based on physical inability to perform because his permanent condition of sleep apnea precluded him from performing the essential functions of working rotational shifts and working overtime. Relying on an Equal Employment Opportunity Commission decision, *Bouffard v. Department of Homeland Security*, EEOC Appeal No. 0120065257, 2008 WL 276452 (E.E.O.C. Jan. 16, 2008), the administrative judge (AJ) sustained the charge, holding that although the appellant established that he was disabled, he failed to establish that he was a "qualified individual with a disability" because he could not perform the essential functions of the position. The Board affirmed, and also held that because it found he was not a qualified individual with a disability, it did not need to reach the issue of undue hardship.

The appellant then petitioned the EEOC for review in response to the

appellant's petition for EEOC review of the Board's decision, and the EEOC found that its prior decision in *Bouffard* was incorrectly decided on the issue of whether the working of rotational shifts and significant amounts of overtime were essential functions of the CBPO position. The EEOC noted that subsequent precedential federal sector cases and its Enforcement Guidance show that the appellant was qualified and could perform the fundamental job duties of a CBPO, and therefore, the Board's reliance on the earlier *Bouffard* precedent was in error. The EEOC also concluded that the agency failed to show that modifying the appellant's work schedule would cause undue hardship, and that the agency error in denying the appellant's reasonable accommodation request amounted to disability discrimination.

**Holding:** The Board reaffirmed its prior decision and certified the case to the Special Panel.

1. The Board found that the EEOC's decision in *Bouffard* was based on an incorrect interpretation of civil service law, rule, or regulation, and was unreasonable.
2. The Board is not required to defer to the EEOC's interpretation of an issue of civil service law, rule or regulation when such an interpretation falls squarely within the purview of the Board's area of expertise.
3. The classification of law enforcement positions are unique under civil service law and require structuring the essential functions of the positions to address the safety and security of the American people.
4. The Board will not "second guess" what an agency has determined is an essential function of a position when those functions are identified by the agency as essential as distinguished from "marginal" functions. It is an agency's ultimate responsibility to determine what is an essential function or duty of the job.

- **The U.S. Court of Appeals for the Federal Circuit did not issue any decisions this week**