



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for October 3, 2014

BOARD DECISIONS

Appellant: Reynaldo Alvara

Agency: Department of Homeland Security

Decision Number: [2014 MSPB 77](#)

MSPB Docket Number: DA-0752-10-0223-E-1

EEOC Petition Number: 0320110053

Issuance Date: September 29, 2014

Appeal Type: Removal

Action Type: Physical Inability to Meet Condition of Employment Due to Medical Condition

Special Panel Standard of Review

Determination of Civil Service Law, Rule or Regulation

Unreasonable Interpretation of Civil Service Law

Ultimate Authority to Determine Essential Functions of Position

Due Deference on EEOC's Reliance on Discrimination Law

Reasonableness of EEOC's Interpretation of Discrimination Law

The appellant was removed from the position of Customs and Border Protection Officer (CBPO) based on a charge of physical inability to meet the conditions of his employment due to his medical condition. The appellant was diagnosed with sleep apnea and he requested that the agency accommodate his condition by exempting him from working the agency's overnight shift and performing overtime. The agency denied the accommodation request based on its position that working all shifts and overtime was an essential function of the position of a CBPO. The appellant asserted in his appeal that the agency discriminated against him based on his disabling condition when it denied his accommodation request.

In affirming the removal action, the administrative judge (AJ) found that the appellant was not a qualified individual with a disability entitled to a reasonable accommodation under the Rehabilitation Act because he could not perform an essential function of his CBPO position. The AJ relied on an EEOC decision, *Bouffard v. Department of Homeland Security*, EEOC Appeal No. 0120065257 (EEOC Jan. 16, 2008), to support her finding that the agency established that the ability to work rotational shifts and overtime were essential functions of the CBPO position. In affirming the AJ's findings, the Board noted, also citing to *Bouffard*, that the Board generally defers to the EEOC on issues of substantive discrimination law unless the EEOC's decision rests on civil service law for its support, or that the decision is so unreasonable that it amounts to a violation of civil service law.

The appellant appealed the Board's final order to the EEOC. In its decision reversing the Board's final order, the EEOC modified its *Bouffard* decision, noting that, in accordance with EEOC Enforcement Guidance and precedential federal sector cases, *Bouffard* was wrongly decided on the issue of the essential functions of a part-time CBPO, and concluded that an employee's schedule and attendance was not an essential function of the position but was merely a method by which an essential function is accomplished. The Commission went on further to conclude that the agency did not establish that the requested reasonable accommodation would be an undue hardship because the appellant was one of 700 CBPO officers and granting his scheduling requests to accommodate his sleep apnea was not an undue burden.

In its Opinion and Certification Order, the Board held that the EEOC decision to which it was asked to defer was unreasonable both from a legal and management operational perspective. The Board held that because the EEOC decision fundamentally addresses not an interpretation of discrimination law, but rather the civil service law issue of the agency's ability to determine the essential functions of any given position. The Board noted that under the statutory scheme set forth in the Civil Service Reform Act, the Board is not required to defer to the EEOC's interpretation of what constitutes a civil service law, rule, or regulation. In this regard, law enforcement officers perform a variety of essential duties to accomplish the agency's mission including the ability to respond to exigent circumstances that would require the occasional performance of duties during the graveyard shift and/or during overtime. The Board cited authority to support the proposition that determining whether a particular function is "essential" is not generally reserved for a fact finder such as the Board or the EEOC on a case-by case basis, because such an approach would amount to "second guessing" the employing agency in what is an essential function of a given position. The Board then certified the case to the Special Panel for disposition.

Holding: The Special Panel held, with Anne M. Wagner dissenting, that it was required to overrule the Board's decision because the EEOC decision did not constitute an incorrect interpretation of a provision of civil service law, rule, regulation, or policy directive. The Special Panel remanded the case to the Board in order to conduct a compensatory damages hearing, order the agency to take appropriate action including cancellation of the removal, and award all back pay and benefits.

1. The Special Panel adhered to the principal of *stare decisis*, and followed the deferential standard of review, which required the Special Panel to give due deference to the Board with regard to civil service principles, and to the EEOC regarding discrimination law.
2. Interpretation of a civil service law, rule or regulation does not encompass interpretation of statutes and regulations relating to employment discrimination. The Rehabilitation Act and other discrimination laws have broader application and are not themselves civil service laws.
3. The EEOC decision did not constitute an unreasonable interpretation of civil service law, because the EEOC's decision did not encroach on an agency's management/operational perspective and discretion to determine tasks, duties, and responsibilities of a given position. Such an analytical approach would result in any EEOC decision that conflicted with any part of an MSPB decision to trigger Special Panel review of the merits. This was not the statutory intent under the CSRA.
4. The EEOC decision does not amount to second guessing the employing agency in what is an essential function of the CBPO position because the Americans with Disabilities Act does not define the term essential functions. Although federal agencies enjoy wide discretion in determining how agency operations will be conducted, management cannot determine as a matter of law whether duties are essential functions. Such a determination of essential functions is performed by the finder of fact - the Board or the EEOC - who will ultimately determine the essential function of a position and not the employer.
5. The EEOC's decision relied strictly on discrimination law, not civil service law, in resolving the issues in dispute. Thus, the Special Panel was required to give the EEOC's decision due deference, and had no authority beyond that to issue its own decision on the merits. Notwithstanding the

Board's argument that the EEOC decision is at odds with the Board's jurisprudence concerning adverse actions based on physical inability to perform, the Special Panel noted that the EEOC's decision is an interpretation of discrimination law and not the Board's jurisprudence concerning adverse actions based on physical inability to perform.

6. The Special Panel concluded that the EEOC's decision was not unreasonable, because the EEOC relied solely on the Rehabilitation act and not a civil service statute. Considering attendance an essential function as opposed to a method by which an essential function is accomplished would lead to the "perverse and unacceptable" conclusion that any employee with disability related absences would be an unqualified individual unable to claim the protections of the Rehabilitation Act.

7. The Special Panel noted that the EEOC reasonably determined that the agency did not meet its "rigorous" burden in substantiating its undue hardship claim because the agency only made generalized conclusions and assessments supporting its view that providing a reasonable accommodation would result in an undue hardship.

DISSENTING OPINION OF ANNE M. WAGNER:

Board Vice-Chairman and Special Panel Member Anne M. Wagner dissented. In her dissent, she stated that she would have found: (1) the EEOC decision constituted a misinterpretation of long-standing Board precedent governing the adjudication of an adverse action based on a charge of physical inability to perform; (2) the decision constitutes a misinterpretation of various provisions of the CSRS; (3) the decision that the Board misinterpreted any provision of discrimination law has no reasonable basis; (4) the decision not to reach the merits of the dispute between the Board and the EEOC regarding whether time and attendance requirements may ever be deemed essential functions of a position is an issue with clear implications under both civil service and discrimination law; and (5) the deferential posture toward the EEOC amounts to a misguided analytical approach erroneously developed by the first Special Panel in *Ignacio v. U.S. Postal Service*, 30 M.S.P.R. 471, 477 (Spec. Pan. 1986), and fails to give proper effect to the Special Panel's statutory duty to decide issues in dispute.

Appellant: Valentino Lopez

Agency: Department of the Navy

Consolidation: NAVFAC Employees - Hawaii v. Department of the Navy

Decision Number: [2014 MSPB 78](#)

MSPB Docket Number: SF-0752-13-2120-I-1 and consolidation SF-0752-14-0265-I-1

Issuance Date: October 2, 2014

Appeal Type: Adverse Action

Action Type: Furlough

Furlough Standards

Equitable Application of Furloughs

The appellant challenged the agency's decision to furlough him from his Utility Systems Repairer-Operator ("USRO") position for no more than 11 days. The appellant claimed that he should have been exempted from the furlough, because his position was a working-capital-funds position, meaning that it was funded by goods and services and not through appropriated funds. The administrative judge ("AJ") held the following: (1) the furloughs promoted the efficiency of the service because they were a reasonable management response to sequestration; (2) the agency could consider its budget situation holistically, instead of doing so individually for each department; (3) the agency did not need to prove an actual deficit existed to justify the furlough, only that the furlough was a reasonable response to the situation; (4) the agency was permitted to include working-capital-funds positions in the furlough due to its authority to use working capital funds for other needs; (5) the agency determined which employees to furlough in a fair and even manner; and (6) the appellants did not prove harmful error, a violation of their due process rights, or discrimination.

Holding: The Board affirmed the ruling as modified.

- 1. The agency's exception to the furlough that allowed employees in the appellant's class to be exempted from the furlough "to the extent necessary" to protect life and property did not allow the appellant to be exempted from the entirety of the furlough.**
- 2. An agency will satisfy the efficiency of the service standard in furlough cases by showing that the furlough was a reasonable management solution to the financial restrictions placed on it, and that the agency applied its determination as to which employees to furlough in a fair and even manner.**
- 3. To apply a furlough in a "fair and even manner," an agency must treat similarly-situated employees similarly and justify any deviations with**

legitimate management reasons. It does not require an agency to do so in such a way that satisfies the Board's sense of equity. Further, the Board will not scrutinize an agency's furlough decisions in such a way that it second guesses an agency's assessment of its mission priorities and requirements.

4. The agency's decision to choose which employees to furlough based on service computation date was a legitimate management reason for the differential treatment, and therefore an acceptable exercise of its managerial discretion.

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

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