

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

REYNALDO ALVARA v. DEPARTMENT OF HOMELAND SECURITY

MSPB No. DA-0752-10-0223-E-1

EEOC Petition No. 0320110053

Washington, D.C.

Monday, September 8, 2014

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Special Panel

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6 ANNE M. WAGNER, Vice Chairman
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1 P R O C E E D I N G S

2 (2:02 p.m.)

3 MR. WALSH: Thank you, Bill. I would
4 also like to add my thanks and the thanks of the
5 Special Panel to the NLRB for their hospitality
6 today and to Gary Shinnars and staff for all their
7 help in arranging this today.

8 We are on the record. The Special Panel
9 will now hear oral argument in the case, Reynaldo
10 Alvara v. Department of Homeland Security, docket
11 number DA0752100223E1 and EEOC petition number
12 0320110053.

13 This hearing is conducted pursuant to 5
14 USC Section 7702(d) and 5 CFR 1201.171. I'm happy
15 to welcome here to the NLRB the full Special
16 Panel: MSBB Vice Chairman Anne Wagner and EEOC
17 Commissioner Chai Feldblum. I am Dennis P. Walsh
18 presiding as Chairman of the Special Panel.
19 Welcome, everyone.

20 The parties are present and represented
21 by counsel. The Special Panel will first hear
22 from counsel for Appellant Alvara. You are
23 allotted 20 minutes with 10 minutes for rebuttal.
24 So, Mr. Gilbert or Mr. Hadley?

25 MR. GILBERT: May it please the Court.

1 My name is Gary Gilbert, and I'm here today on
2 behalf of the petitioner, plaintiff, Appellant,
3 Mr. Alvara. I'm going to take just a moment to
4 introduce myself and my very dear colleague, Ernie
5 Hadley, after which we are going to divide our 20
6 minutes as we prearranged with the panel.

7 Mr. Hadley is first going to address the
8 first question of the extent to which this matter
9 addresses a matter of interpretation civil service
10 law, and then I'm going to address the remaining
11 issues having to do with whether or not there was
12 a reasonable basis for the decision by the EEOC.

13 MR. WALSH: Okay.

14 MR. GILBERT: I will say it's indeed a
15 real pleasure for me to be here today. I am
16 ticking off two of my major career goals: One is
17 I always wanted to appear before the National
18 Labor Relations Board.

19 MR. WALSH: Yeah?

20 MR. GILBERT: I think I can tick that
21 one off. Mr. Hadley and I have spoken extensively
22 for some 30 years in which we have talked about
23 the unusual provision in the law for appearances
24 before a Special Panel. We've always said that
25 our careers would not be complete without

1 appearing before one, and I guess we have the
2 ability to tick that one off our list of things to
3 do; off our professional bucket list, so to speak.

4 Again, my name is Gary Gilbert, and I am
5 in private practice. I manage a law firm. I am
6 the principal of a law firm of somewhere in the
7 neighborhood of 22, 23 lawyers. We are, I
8 believe, the largest law firm in the country that
9 practice primarily focused on federal sector law.
10 We've had many hundreds of cases before both the
11 EEOC -- perhaps thousands -- and before the Merit
12 Systems Projection Board.

13 I had the great pleasure of being a
14 member of the Commission staff from 1986 until
15 2002. I was the administrative judge, mostly as a
16 chief administrative judge, for the EEOC in the
17 Baltimore District Office. I've had the pleasure
18 when the ADA was passed in 1990 of being one of
19 three individuals responsible for providing the
20 training to EEOC lawyers and investigators with
21 regard to the then-new Americans with Disabilities
22 Act, and I've written several textbooks on the
23 subject.

24 Mr. Hadley, again a dear friend and
25 colleague, is well-known for a variety of

1 different issues aside from his work in this field
2 for some 35 years now. Mr. Hadley has written
3 extensively, spoken extensively on the subject of
4 employment discrimination law and other aspects of
5 federal employment law. He is, perhaps, best
6 known for a textbook he has authored, which I
7 think most of us consider to be the bible for
8 practice before the Equal Employment Opportunity
9 Commission. With that, Ernie?

10 MR. HADLEY: Thank you, Gary, and may it
11 indeed please the Special Council. As Gary said,
12 my name is Ernest Hadley. I have the privilege,
13 along with Julie Rook and Gary Gilbert, of
14 representing Mr. Alvara today.

15 The critical and, indeed, the outcome
16 determinative issue in this case is whether
17 working a graveyard shift and substantial overtime
18 are essential functions of being a Customs and
19 Border Protection officer. The only reason that
20 issue is critical and outcome determinative is
21 because it is necessary to decide that in order to
22 determine whether Mr. Alvara is a qualified
23 individual with a disability entitled to
24 reasonable accommodation under the Rehabilitation
25 Act.

1 That is purely an issue of
2 discrimination law, and no amount of window
3 dressing by the MSPB changes that. In fact, I
4 would like to draw the Special Panel's attention
5 to the first decision in the Alvara case by the
6 Board at 2011 MSPB 75, Paragraph 8, and I'll omit
7 the citations.

8 Before the EEOC directly addressed the
9 dispositive issue presented in this case, we note
10 the Board generally defers to the EEOC on issues
11 of substantive discrimination law unless the
12 EEOC's decision rests on civil service law for its
13 support or is so unreasonable it amounts to a
14 violation of civil service law. Accordingly,
15 because the Bouffard decision involves an issue of
16 substantive discrimination law, it is neither
17 based on civil service law or is so unreasonable
18 as to amount to a violation of civil service law,
19 we will defer to the EEOC's determination.

20 The only thing that changed between the
21 Board's first decision in this case and the
22 Board's second decision in this case is the
23 outcome. The outcome is not determinative of
24 whether or not this is a matter of civil service
25 law or discrimination law.

1 MS. WAGNER: Mr. Chairman, may I ask a
2 question at this point?

3 MR. WALSH: Go ahead.

4 MR. HADLEY: Yeah?

5 MS. WAGNER: Mr. Hadley, but the fact is
6 is that the question of whether rotational shifts
7 and overtime was dispositive in terms of the
8 initial determination as to whether your client
9 was being reasonably accommodated. The fact is is
10 that once the EEOC issued its decision -- that
11 we're looking at and reviewing here -- and made
12 the categorical determination that time and
13 attendance were never going to be considered to be
14 essential functions of a position, that it clearly
15 implicated, if not explicitly, but clearly
16 implicitly implicated fundamental principles of
17 civil service law that are found throughout Title
18 5 that essentially give agencies the primary
19 authority in the first instance to determine the
20 terms and conditions of employment that it deems
21 necessary to reach and fulfill the critical
22 mission of the agency. So, I think that's what's
23 at issue here, and that clearly implicates civil
24 service law.

25 MR. HADLEY: The only reason we're

1 talking about essential functions is that's a term
2 of the Rehabilitation Act, not civil service law.
3 And to the extent that the Board, in its second
4 decision, also again -- Paragraph 9 reemphasizes
5 the fact that this issue is relevant to whether
6 somebody's a qualified individual with a
7 disability under the Rehabilitation Act, not under
8 civil service law.

9 MS. WAGNER: Yes, of course it is. But
10 the question here is the categorical nature of the
11 EEOC's determination at this point. They have
12 categorically excluded time and attendance from
13 ever being considered essential functions in a job
14 position. So at that point, this isn't a
15 case-by-case analysis. This is a categorical
16 blanket determination that time and attendance can
17 never be deemed essential functions because
18 indeed, according to the EEOC, they're not
19 functions at all.

20 MR. HADLEY: That, Vice Chairman Wagner,
21 doesn't appear the Board's decision has any
22 rationale for its decision. What it says here in
23 the first instance is that the EEOC's
24 determination is an incorrect interpretation of
25 civil service law.

1 What does the Board do to support that?
2 It says, "The special nature of these jobs is why
3 law enforcement officers are treated differently
4 from other civil servants from everything from
5 essential functions to retirement calculations,"
6 Paragraph 13. The Board cites three statutes: 5
7 USC 8331.2, which actually I think they mean 20; 2
8 relates to members of Congress; 20 is law
9 enforcement officers. 8401.17: Those have to do
10 with defining law enforcement officers for
11 purposes of retirement annuities, not for purposes
12 of discrimination law. Nothing in those --

13 MR. WALSH: But, Mr. Hadley, can I just
14 interrupt you here? Isn't it relevant that this
15 is a law enforcement position? Let's assume the
16 truth of Vice Chair Wagner's point here, that
17 attendance itself is not an essential function;
18 that's what the EEOC was holding. Isn't
19 attendance, in general, different from a
20 requirement that a law enforcement officer has to
21 work the overnight shift occasionally or else
22 they're not going to be able to cover the
23 functions of the job? I mean, it's law
24 enforcement. They have to be able to rely on
25 their people to be their overnight. Why isn't

1 that essential?

2 MR. HADLEY: Chairman Walsh, I'm looking
3 and looking in vain for a part of Title 5, a civil
4 service law, rule, or regulation that actually
5 says that that's a requirement of being a law
6 enforcement officer. The statutes that I'm
7 looking at list a range of duties -- job duties,
8 not essential functions -- no mention of a
9 graveyard or rotating shift, no mention of
10 overtime. There are delineation of types of
11 duties, functions, outcomes --

12 MR. WALSH: Okay. Maybe my point goes
13 more to the reasonableness here, but there
14 certainly are provisions in the medical standards
15 and the position description of this law
16 enforcement that say that they must be ready to
17 rotate into overnight shifts.

18 MR. HADLEY: There is a difference of
19 distinction, Chairman Walsh, between a
20 qualification standard and an essential function
21 of the job. In fact, one of the cases the Board
22 cites in support of it, which is an EEOC case, has
23 to do with qualification standards, which is
24 actually a different part of the Rehabilitation
25 Act than the essential functions part, which is a

1 requirement of reasonable accommodation. And --

2 MR. WALSH: But it's in the job
3 description too. The job description is not a
4 qualification.

5 MR. HADLEY: Right.

6 MR. WALSH: A job description describes
7 the job, and the DHS has said part of your job is
8 you must be willing and ready to rotate.

9 MR. HADLEY: A position description is
10 simply one factor that goes into the determination
11 of an essential function. That's been
12 longstanding by Commission regulation, by policy
13 guidance, by case precedent. There are other
14 factors as well that go into the determination of
15 an essential function.

16 MS. FELDBLUM: So, Mr. Hadley, let me
17 just follow up in terms of this issue of the
18 categorical nature of the EEOC decision.

19 MR. HADLEY: Okay.

20 MS. FELDBLUM: So, in Alvara the EEOC
21 held that the ability to work a graveyard shift
22 was not, as a legal matter under the
23 Rehabilitation Act, a function of the job
24 essential or otherwise, and instead held that the
25 job requirement, as Chairman Walsh just noted,

1 that CPBOs be available for graveyard shifts could
2 be modified with respect to Mr. Alvara without
3 imposing under hardship.

4 So, my question to you is does the
5 EEOC's holding in Alvara mean that the agency
6 could never require workers to be available for
7 significant overtime or would always be required
8 to grant a request from an employee with a
9 disability who wanted a permanent exemption from
10 the graveyard shift? I mean, wouldn't the agency
11 have the right to prove under hardship in these
12 different scenarios?

13 MR. HADLEY: You're absolutely correct,
14 Commissioner Feldblum. The determination of
15 reasonable accommodation and undue hardship, which
16 are different from the essential function, is done
17 by an individualized analysis on a case-by-case
18 basis. It would take into account such things:
19 Is the number of agents available to perform that
20 function?

21 We have seen, in fact, in one case that
22 I believe the agency cited, the Cyr case, we had a
23 very, very small outpost of immigration
24 inspectors, and the Commission determined because
25 of the small number -- not that it wasn't an

1 essential function -- it would be an undue
2 hardship to accommodate that.

3 It is always an individualized
4 determination. I don't think the Commission says
5 here in its decision, unlike what the Board says,
6 is categorically it's always an essential
7 function. The Commission says this is an
8 individualized determination.

9 MS. WAGNER: But isn't it the case that
10 the fact that these factors can be considered an
11 undue hardship, but not in terms of as essential
12 functions, that's completing those two inquiries
13 completely, and they're two separate elements of
14 the statute.

15 MR. HADLEY: That's correct, and the
16 Commission has given more than a reasonable basis
17 for that decision. If you factor attendance
18 requirements into the qualification determination,
19 you eliminate a disproportionate number of
20 individuals with disabilities who will never even
21 get considered for accommodation or whether it
22 would be an undue hardship to accommodate because
23 --

24 MR. WALSH: Let's address that point,
25 and maybe again this gets beyond your portion of

1 the argument, but on the undue hardship point why
2 was that an unreasonable determination? Why isn't
3 it arguably unreasonable? It's going to require
4 other people to fill in here, right?

5 This graveyard shift has to be covered.
6 This is not like other jobs. This is a job where
7 this time period has to be covered by qualified
8 people. It's going to require other people to do
9 it. Why wouldn't that be a burden? It's
10 certainly going to be a burden to other officers,
11 maybe many other officers.

12 MR. HADLEY: May I yield to Mr. Gilbert
13 on that question?

14 MR. WALSH: Sure.

15 MR. HADLEY: Thank you.

16 MR. GILBERT: There's no question that,
17 at some level, it might be on an individualized
18 assessment and undue hardship for an employer to
19 accommodate the needs for reasonable accommodation
20 of an employee, and that's no different for a law
21 enforcement officer. In some instances, law
22 enforcement agencies may have an easier burden to
23 show that, in fact, there is an undue hardship to
24 provide an accommodation.

25 But you have to understand this is a

1 factual inquiry. If this Panel were to set aside
2 the Commission's decision, which I think is a very
3 well-reasoned decision (inaudible), what the Panel
4 would be doing under those circumstances is
5 setting aside 40 years of guidance the Commission
6 has given about essential functions under the
7 Rehabilitation Act and some 20 years under the
8 (inaudible) and in particular this case.

9 MR. WALSH: You say "well-reasoned."
10 What was the reasoning on the undue hardship claim
11 that the EEOC --

12 MR. GILBERT: The Commission's decision
13 here rested upon the fact that other employees --
14 and I'm skipping over the essential function
15 argument -- the reason it's not an undue hardship
16 in this instance is because of the fact that this
17 is an agency that shows to excuse people routinely
18 from working the graveyard shift (inaudible).

19 MR. WALSH: But that's on a temporary
20 basis, sir.

21 MR. GILBERT: No, that's not --

22 MR. WALSH: The case law is quite clear
23 that we don't have to consider temporary;
24 temporary's not the same as permanent.

25 MR. GILBERT: The question is what were

1 the employees of the agency required to do, and
2 testimony in the record established that there
3 were some individuals who had never worked a
4 graveyard shift at night; never.

5 MR. WALSH: Are you referring to
6 pregnancy and breast feeding?

7 MR. GILBERT: There were three classes
8 of individuals who were excused from working the
9 graveyard shift. The first of those is the class
10 that you just suggested; those are individuals who
11 had a temporary medical condition.

12 MR. WALSH: Right, that's temporary.

13 MR. GILBERT: They were excused. It was
14 temporary. The second class is individuals who
15 were allowed to swap shifts. We believe there
16 were an unidentified number because the agency
17 made no effort to identify how many of their
18 employees actually had never worked the graveyard
19 shift. In fact, but for the fact that there was
20 what, we think, may have been an unlawful inquiry
21 into individuals with disabilities to clean out
22 those individuals who were not working the full
23 range of duties or otherwise being provided
24 reasonable accommodation, other than the agency's
25 decision to scrutinize those employees, our client

1 would have remained so-called "under the radar"
2 forever swapping their shift --

3 MR. WALSH: Are you saying that was an
4 inappropriate inquiry to look into the fact that
5 there were a lot of people on light duty and, in
6 the agency's views, not enough coverage of their
7 overnight shift?

8 MR. GILBERT: That is not an issue
9 before the Panel. That was not an issue before
10 the Board. But, yes, frankly, I do believe that
11 you cannot choose to scrutinize individuals with
12 disabilities for improper purposes. We don't need
13 to get there. That was not an issue before --

14 MR. WALSH: Yeah, I'm just not so sure
15 it's improper to determine whether you have
16 sufficient coverage of your shifts.

17 MR. GILBERT: That was not the purpose
18 of the inquiry. At no time was the purpose of the
19 inquiry to determine whether there was sufficient
20 coverage for the shifts. In fact, the record has
21 nothing to suggest that there was, at any time, a
22 lack of appropriate coverage. On the contrary --

23 MS. FELDBLUM: Mr. Gilbert, wasn't the
24 fact that --

25 MR. WALSH: I've distracted you, sorry.

1 MS. FELDBLUM: Wasn't the fact that
2 there were almost 700 officers at that site a key
3 issue in whether the EEOC's decision -- it wasn't
4 undue hardship -- a reasonable interpretation of
5 discrimination law?

6 MR. GILBERT: That's absolutely correct.
7 The Commission has some extensive guidance that
8 has been adopted by every federal court. In fact,
9 the Silk case, the case that the MSPB cited in its
10 very decision, Silk involved a police officer in
11 the City of Chicago who was unable, because -- a
12 remarkable similarity in facts -- a police officer
13 developed sleep apnea. After some period of time
14 required reasonable accommodation. After several
15 other forms of accommodation, ultimately requested
16 and was granted an accommodation to be excused
17 from the third shift, the graveyard shift.

18 MS. WAGNER: Mr. Gilbert, can we please
19 get back to -- the fact here is we're not really
20 talking about undue hardship. We're talking about
21 the much more foundational, fundamental element of
22 this cause of action which is essential functions.

23 It seems to me that the EEOC's
24 regulations which say that an agency can consider
25 that there are a limited number of employees to

1 perform a function and identifying that as an
2 essential function doesn't necessarily make the
3 converse true: That because there are a lot of
4 people who can perform the function that the
5 function therefore becomes nonessential, and that
6 an agency shouldn't be able to require every
7 person in that position to be able to perform that
8 function.

9 MR. GILBERT: To the best of my
10 knowledge, there's not a federal court that has
11 reviewed this position that has disagreed with the
12 Commission policy on this matter.

13 More importantly, this is not a question
14 of whether the Commission interpreted the law
15 correctly or not. The only question here before
16 the panel is whether or not there was a reasonable
17 basis for the Commission's decision. There is a
18 reasonable basis, and every federal court that has
19 addressed --

20 MS. WAGNER: The Commission's decision
21 ignored the employer's evidence that this was an
22 essential function of this position. The EEOC's
23 position ignored the position description, and
24 these are pieces of evidence that the regulations
25 themselves say the EEOC should consider.

1 MR. GILBERT: With all due respect, Vice
2 Chair, I believe you're reading a different
3 decision than I am. I believe the Commission's
4 decision, again, well-reasoned, and all it does it
5 validates, it regurgitates law that is well-
6 established not just from the Commission but from
7 federal courts as well. It explicitly addressed
8 the question of whether or not this is an
9 essential function, and it does address the
10 question of other individuals, the Commission's
11 guidance.

12 MR. WALSH: Can you just go back a
13 second and answer the question about the time and
14 attendance being an across-the-board -- taking
15 that off the table for essential functions? Why
16 isn't that a problem? Isn't that unreasonable?
17 Why isn't that a problem?

18 MR. GILBERT: It is not unreasonable,
19 but again, that is not the standard here. But
20 nonetheless, if that were the standard -- I can
21 read you the language from the Commission's
22 decision in this matter. "There is a strong
23 temptation among agencies to frame attendance or
24 other measures of the time in which functions must
25 be performed as essential functions. This

1 represents a flawed understanding of the
2 requirements and structure of the Rehabilitation
3 Act." The Commission goes on from there to
4 explain why that is. But the fact is --

5 MR. WALSH: But they say that attendance
6 is not a duty, and so we're not going to look at
7 it as a function.

8 MR. GILBERT: That's correct.

9 MR. WALSH: Isn't that an
10 across-the-board; taking it off the table forever?

11 MR. GILBERT: They are not going to look
12 at it as an essential function in and of itself.
13 It goes on to say that performing certain job
14 functions sometimes requires a person's presence
15 at the work site. But the fact that attendance
16 can be a condition precedent to performing a
17 function does not render it a job function in and
18 of itself. I believe that is well-accepted law at
19 this point in time.

20 MR. WALSH: I'm afraid you're out of
21 time.

22 MR. GILBERT: Okay.

23 MR. WALSH: Thank you very much.

24 SPEAKER: Thank you.

25 MR. WALSH: Who do we have? Mr. Acuri

1 first or --

2 MR. ACURI: Yes, sir.

3 MR. WALSH: Okay, it's all yours.

4 MR. ACURI: May it please this special
5 panel. Good afternoon.

6 MR. WALSH: Good afternoon.

7 MR. ACURI: Thank you. My name is Peter
8 Acuri. I'm with Lamont Nahrgang. We represent
9 the United States Customs and Border Protections
10 Office of Assistant Chief Counsel in El Paso,
11 Texas. We're here to talk to you about CBPOs as
12 the law enforcement officers, front line uniformed
13 border security badge wearing, gun toting law
14 enforcement officers. They detect and prevent
15 terrorists from entering the United States. They
16 enforce customs and immigration and agriculture
17 laws.

18 MR. WALSH: Mr. Acuri?

19 MR. ACURI: Yes, sir.

20 MR. WALSH: I'm sorry to interrupt you
21 so early, but I think that the Appellant may have
22 raised a valid point here in terms of what we have
23 the jurisdiction to do here. I believe all we --
24 really the first question we have to answer is was
25 there a specific civil service law, rule,

1 regulation, or policy directive that was
2 incorrectly interpreted by the EEOC, something
3 specific. Now I had a hard time finding that in
4 the MSPB decision certifying to us. Maybe you
5 could help me find it.

6 MR. ACURI: The right to assign work.

7 MR. WALSH: Where --

8 MR. ACURI: Title 5.

9 MR. WALSH: Where -- what's the law, the
10 citation?

11 MR. ACURI: It's Title 5.

12 MR. WALSH: Title 5? There's -- that's
13 a big title.

14 MR. ACURI: Yes. Well, I think it's
15 7106.

16 MR. WALSH: Okay. Now so you're citing
17 management rights under 7106 of the -- first of
18 all I didn't see that cite in the MSPB decision as
19 the specific rule. But secondly isn't an
20 accommodation by its nature going to somewhat
21 interfere with management's rights to assign work
22 and all of management's right? I mean management
23 rights under 7106 is a pretty broad concept. If
24 accommodation is required it's going to somewhat
25 cut into those rights isn't it, every time?

1 MR. ACURI: I think that you're going to
2 see that -- I think the point generally speaking
3 is fair, however I think in this situation it's
4 dramatically different because of the nature and
5 the function of the CBPO itself because --

6 MR. WALSH: Where is that in 7106?

7 MR. ACURI: Well, that's the overarching
8 principle that we're saying is being violated
9 here.

10 MR. WALSH: All right. But our law
11 doesn't say overarching principles, it says a
12 specific civil service law, rule, regulation, or
13 policy directive was incorrectly interpreted. I
14 don't -- you haven't cited one yet.

15 MR. ACURI: Well, I cited it in the
16 brief and it cited as 5 U.S.C. 7106.

17 MR. WALSH: Okay.

18 MR. ACURI: And then the --

19 MR. WALSH: I'm not convinced that's the
20 one -- that that's a valid one because every
21 accommodation is going to cut into management's
22 rights.

23 MS. WAGNER: Counsel if I might just
24 jump in because it is the Board's decision that is
25 in issue here.

1 MR. WALSH: That I am ripping apart.

2 MS. WAGNER: And it is true that there
3 weren't specific provisions cited because I think
4 fundamentally it was -- there's almost an obvious
5 assertion that -- and certainly implicit in the
6 order that it is -- the agencies of -- the civil
7 service law gives the agencies in the first
8 instance the primary authority to identify what's
9 essential functions in a position. And I think
10 the provisions cited in the order were to
11 substantiate the agency's claims that rotational
12 shifts and overtime were essential, were not
13 bogus. That, you know, these are law enforcement
14 officers and there's a whole separate pay system
15 and a whole separate retirement system designed to
16 accommodate the fact that they're rotational
17 shifts and overtime and what not. But the fact
18 remains is that -- and I won't take everybody's
19 time up here, but we could go through, you know,
20 Chapter 51 of Title 5, Chapter 61 dealing with
21 time and attendance, 51 dealing with
22 classification, 43 dealing with performance
23 management, some it be -- one dealing with labor
24 relations that all essentially establish the
25 agency's right in the first instance. I'm not

1 saying it's not reviewable but it's the agency's
2 right and authority and duty in the first instance
3 to establish the terms and conditions of
4 employment subject to review certainly, but not
5 preempted entirely by another Federal agency.

6 MR. ACURI: Okay.

7 MR. WALSH: Okay. And I guess -- yeah,
8 but I guess part of my point though, and maybe you
9 can answer this for me too, is that aren't we as a
10 special panel, aren't we -- isn't our job here to
11 review a written decision by the MSPB and if
12 something's not in there how can we review it? I
13 mean I -- as persuasive as Ms. Wagner's argument
14 might be I didn't see it in the decision. How can
15 we review that if it's not there?

16 MR. ACURI: Well, consider it an
17 omission or -- for lack of a better work.

18 MR. WALSH: I would definitely consider
19 it that.

20 MR. ACURI: I will take the
21 representation at face value in that respect but
22 that does not negate the existence of the law
23 itself. It's just like -- it's the same as not
24 waiving an affirmative defense or waiving an
25 affirmative defense. It's still out there in the

1 governing law and it does speak to not only the
2 fundamentals and what the agency needs which is to
3 be able to expect its employees to do certain
4 things, but it also speaks to the nature of how
5 unreasonable the consequences here are.

6 MS. FELDBLUM: So actually assuming that
7 that statute despite maybe not being explicitly
8 stated in the opinion is relevant in terms of a
9 violation, I'm curious whether you think that that
10 statute, 7106(a)(2)(b), that says you can make
11 management decisions, it is your decision that
12 this statutory provision negates the statutory
13 anti discrimination provision in the
14 Rehabilitation Act?

15 MR. ACURI: No, I don't think negates
16 the EEOC's authority but I think that they need to
17 align themselves properly and if they don't --

18 MR. WALSH: Well, that's why were' here.
19 To figure out why.

20 MS. FELDBLUM: So just in terms Chairman
21 Walsh's comment, that accommodations will sort of
22 inherently affect management it seems like your
23 argument is more that the second part of the
24 standard, that the EEOC's decision is so
25 unreasonable in terms of how it applied those

1 Rehabilitation Act standards such that it violated
2 this provision. Is that correct? It's not --
3 it's the second part of the standard about how
4 unreasonable the EEOC's decision is, not the first
5 part of the standard that EEOC's decision relied
6 on and misapplied a civil service law? Is that
7 correct?

8 MR. ACURI: Yes, Your Honor. In fact, I
9 think that when you look at the broader spectrum
10 of what we have going on here it is what's
11 reasonable and unreasonable. And we --

12 MR. WALSH: Okay. Again, though I want
13 to come back to the same point I was making though
14 is where is that in MSPB decision? The MSPB
15 decision for the most part covered the first
16 question, inadequately in my view, but it covered
17 it.

18 MR. ACURI: Well --

19 MR. WALSH: And then at the end it said
20 we also think by the way that the EEOC's decision
21 was unsupported by the evidence in the record and
22 was unreasonable. Where is the specific reasoning
23 in that decision for why the EEOC's decision was
24 unreasonable?

25 MR. ACURI: Well, I think that when you

1 look at the latter portion of the MSPB's decision
2 you do see some citations to case law such as Silk
3 where you're looking at law enforcement officers
4 specifically and what they have to do and why an
5 interference with things like overtime and shift
6 work will make it unreasonable. Because again you
7 are talking about assigning work and you are
8 talking about very clearly accounted for
9 obligations for CBPOs in particular. However,
10 this isn't a hypothetical here. What we're
11 talking about is CBPOs that get ordered lots of
12 overtime. They could get ordered at the end of a
13 shift. They can get ordered it for as much as the
14 same amount that they've already service. So you
15 can see --

16 MR. WALSH: Isn't there a limit on how
17 much they can get ordered in the collective
18 bargaining agreement?

19 MR. ACURI: There are mechanisms in
20 place in the collective bargaining agreement that
21 do address how things like -- sorry -- overtime
22 and shift work are contemplated. And there are
23 also caps on the amount of overtime that CPBOs can
24 work. And that's one of the reasons why overtime
25 and shift work are essential because you need your

1 work force to be able to accomplish these tasks.

2 MS. FELDBLUM: So can I ask you the same
3 question I asked appellant's lawyers, so does the
4 EEOC's holding in Alvara meant that the Agency,
5 DHS, could never require workers to be available
6 for significant overtime as you just described, or
7 would it always be required to grant a request
8 from an employee with a disability who wants a
9 permanent exemption? Do you read the EEOC's
10 Alvara decision as concluding that?

11 MR. ACURI: I see the EEOC's decision as
12 making comparisons between the temporary
13 accommodations and the one permanent accommodation
14 that we have before us, and I see that being a
15 dividing line. In other words --

16 MS. FELDBLUM: Okay, so is that a yes or
17 a no to the question?

18 MR. ACURI: Well, it's a very long
19 question to be honest with you; I'm trying to
20 break it down.

21 MS. FELDBLUM: Okay. I'm sorry. Let me
22 just say it again. Do you understand the EEOC's
23 Alvara decision as meaning that your agency, your
24 agency could never require workers in some
25 location to engage in significant overtime? Let

1 me just ask you that one first. Do you read that
2 decision as meaning that your agency could never
3 require workers in some location to always have to
4 be available for significant overtime?

5 MR. ACURI: I think that there are
6 locations where significant overtime is not
7 necessarily the largest issue. So it's not
8 necessarily a yes or no question. And that gets
9 to what we're talking about --

10 MS. FELDBLUM: Well, I guess it's a
11 legal question. So let me ask it on the graveyard
12 shift, do you read the EEOC's Alvara decision as
13 meaning that your agency, DHS, can never require
14 workers in a certain location to always be
15 available for graveyard shifts, on a temporary
16 basis, on a permanent basis? Do you read the
17 decision as meaning that your agency can never
18 require that of your workers?

19 MR. ACURI: I see it as opening the door
20 to that, yes. I see us being forced into a
21 position where if we have a lot of people who have
22 the same type of accommodation -- now we have a
23 situation where we can't order anybody --

24 MS. FELDBLUM: Okay, does that mean that
25 you do not understand the undue hardship analysis

1 as being cumulative? In other words that it might
2 be that you have to make a certain accommodation,
3 no graveyard shifts for five employees because it
4 won't be an undue hardship, but actually when the
5 sixth and seventh employee asks for it, that -- do
6 you read the undue hardship analysis as not
7 allowing an employer to then prove undue hardship
8 for the sixth, seventh, eight employee?

9 MR. ACURI: Well, actually the way that
10 I read the decision is that it converts it into an
11 undue hardship analysis when that shouldn't be the
12 case.

13 MR. WALSH: Well, why not?

14 MR. ACURI: Because (inaudible) the
15 function. Why shouldn't attendance and shifts and
16 when you do the work be an undue hardship issue?
17 I mean isn't it a class undue hardship? Is it too
18 much of a hardship for us to accommodate this
19 person's time on the job?

20 MR. WALSH: And you could show it is. I
21 mean factually isn't -- there's no reason you
22 couldn't show it if you have that situation. Why
23 isn't it classically an undue hardship issue and
24 not an essential function issue?

25 MR. ACURI: Well, I do think actually in

1 this situation you can show that it is an undue
2 hardship, okay, but I think that --

3 MR. WALSH: But that's not the question.

4 MR. ACURI: I know.

5 MR. WALSH: The question is was is it
6 unreasonable for them to say it was?

7 MR. ACURI: Right. And I'm with you.

8 In my mind, you don't reach that tier because what
9 you're looking at is the functions of the CBPO and
10 the necessities of having them available for shift
11 work and overtime. And so I don't in my mind come
12 down to the undue hardship analysis.

13 MR. WALSH: Well, but that's my
14 question, why not? I mean why -- what's wrong
15 legally with making it an undue hardship question?
16 It seems like a classic undue hardship question.

17 MR. ACURI: Because the Agency and the
18 law contemplates a lot of different criteria that
19 consider what an essential function is. If
20 regulations that go towards position descriptions,
21 you've got the incumbus of the position, you've
22 got national bargaining agreements. You have a
23 bargaining unit and concerns over whether or not
24 you have a disparity in the treatment as between
25 them and you want to make sure that they are all

1 obliged to do the same work. And --

2 MR. WALSH: Yeah, but -- okay. But the
3 -- I think the case law is pretty clear that EEOC
4 can't consider whether other employees are upset
5 by an accommodation or not.

6 MR. ACURI: I think that it's a minor
7 factor. I would concede that if you --

8 MR. WALSH: I think it's not supposed to
9 be a factor at all. I would refer to Commissioner
10 Feldblum on that, but I think that that's not
11 supposed to be a -- just because someone else is
12 upset that I have to pick up the slack for an
13 accommodation, that's not supposed to be an undue
14 hardship.

15 MR. ACURI: Looking at morale on its own
16 I would imagine that you're correct but I don't
17 think that we're supposed to be looking at morale
18 alone, and I don't think the regulations permit
19 that either.

20 MR. WALSH: Right.

21 MR. ACURI: I think you start looking at
22 a lot bigger picture.

23 MS. WAGNER: And is it the case to the
24 Chairman's question, I mean is -- who can -- how
25 many people you have to perform the function and

1 whether they can, you know -- how frequently they
2 can perform the functions, are those -- those are
3 factors that go to determining whether the
4 function itself is essential?

5 MR. ACURI: No, I see that more as the
6 undue hardship analysis in that second tier, and I
7 see that analysis in that case to be flawed in a
8 couple of key ways. What we have here is a vision
9 of the CBPO work force at an El Paso port where
10 700 CBPOs are just sitting around doing nothing
11 which isn't the case at all. What you have is
12 four bridges, you have multiple different shifts,
13 you have different individual responsibilities
14 that include primary and secondary lanes, you have
15 cargo functions, foreign trade zones. And when
16 you take that large number and you break it down
17 to the individual locations and the individual
18 responsibilities what you get is the shorter
19 worker force and then the ability to absorb this
20 one loss becomes very difficult.

21 MR. WALSH: But there was some empirical
22 evidence though in the record on how many people
23 actually work the overnight shift. I think it was
24 like seven percent of the work force. That's not
25 a large percentage that have to do it.

1 MR. ACURI: Well, I don't think it's
2 simply about who works it at any one given time.
3 I think it's about having the rotation through
4 because what you have is you have bargained for
5 terms where the CBPOs and the Union have said
6 shifts go to certain people at certain times.
7 There's an order involved here and so perhaps --
8 I'll take your representation at face value that
9 there's seven percent, but that seven percent is
10 going to change. I don't remember the terms; it
11 could be biannually.

12 MR. WALSH: Right.

13 MR. ACURI: Or it could be whatever, but
14 it's availability to move.

15 MR. WALSH: Right.

16 MR. ACURI: And there's seniority
17 considerations and there's a lot of -- there's
18 some desirable shifts out there in El Paso.
19 Sitting in the hot sun looking in primary at cars
20 coming in from Mexico can be hard.

21 MR. WALSH: I think there's evidence in
22 the record though that there -- some of the
23 officers actually desired the overnight shift.

24 MR. ACURI: I think that you're probably
25 right on that. Some people do because --

1 MS. FELDBLUM: Maybe so that they don't
2 have to sit in the sun.

3 MR. ACURI: Right, right.

4 MS. FELDBLUM: So but let me ask you one
5 other question. In the Bouffard opinion, in the
6 beginning of the Bouffard opinion which we then
7 overturned in one respect, the decision issued by
8 our Office of Federal Operations stated, "As a CBP
9 officer complainant's duties included inspecting
10 travelers, examining selective applicants for
11 various immigrations privileges and benefits,
12 seizing suspect property and detaining people
13 engaged in suspicious activity. Special
14 requirements for the position included caring a
15 firearm, possessing a valid state driver's
16 license, working shifts on a rotating basis,
17 performing substantial amounts of overtime, and
18 undergoing a security clearance investigation."
19 Would you agree with those two sentences?

20 MR. ACURI: I'm going to take your word
21 for it if that's what's in the decision.

22 MS. FELDBLUM: No, no, no. That is
23 what's in the decision. My question to you is
24 would you agree that that's an accurate
25 description of the duties of a CBP officer and the

1 special requirements for the position that CBP
2 applies to that position?

3 MR. ACURI: I think that maybe there's
4 two different documents. I think that there's the
5 position description itself and then there's the
6 medical and physical requirements documents.

7 MS. FELDBLUM: Okay.

8 MR. ACURI: And perhaps -- I may be
9 conflating the two, but I have duties in my mind
10 as the position description and then in the
11 special -- or I'm sorry, physical requirements I
12 have the latter portion of what you're citing in
13 my mind.

14 MS. FELDBLUM: Okay. So, you know, the
15 duties and the requirements. Do you see any legal
16 differences for purposes of the Rehabilitation Act
17 between the duties described in the first sentence
18 and maybe perhaps put in the job description and
19 the special requirements of the job that are
20 described in the second sentence? For purposes of
21 the Rehabilitation Act do you see any legal
22 difference between those two?

23 MR. ACURI: Yes, I do because I think
24 that you don't simply focus on the descriptions
25 themselves. And I think when you look to the regs

1 and you look to the law --

2 MS. FELDBLUM: No, no. That's not the
3 -- I'm not asking about the job description
4 question, I'm saying as a legal matter under the
5 Rehabilitation Act, does it matter that something
6 is a duty of the job, something that has to be
7 achieved in this job, you know, detaining people
8 engaged in suspicious activity, and the
9 requirements of the job? The requirements that
10 you have to show you can meet in order to perform
11 those essential functions, the requirement of
12 being able to carry a firearm, work shifts on a
13 rotating basis?

14 MS. WAGNER: Commissioner, I think your
15 question is getting at the part of the EEOC
16 decision that differentiates between the "what" of
17 a function and the "when" of a function. And
18 essentially divorces those two in terms of
19 determining what constitutes an essential
20 function. Do you agree that it's permissible to
21 -- or that it's permissible to divorce those two
22 in categorical ways such as the EEOC has done
23 here?

24 MR. ACURI: No. And what I think that
25 you should do is take a look at the position on a

1 case by case basis. That's exactly what I think
2 and I think that that's what the law contemplates
3 is taking a look at all of the testimony and
4 evidence that's presented by the --

5 MR. WALSH: I guess I go back to why
6 can't you do that in the undue hardship party of
7 the equation when it comes to when you're actually
8 working the job?

9 MR. ACURI: Well, I think that that was
10 done in this case but I don't think that it was
11 necessary in this case.

12 MR. WALSH: Okay, your time is almost up
13 but I did want to ask you a couple of more legal
14 questions so I'll give you a little bit more time.
15 Just legally, in its first decision the MSPB
16 defers to the EEOC's interpretation of
17 discrimination law in the Bouffard. Okay. They
18 explicitly say we have to defer, but then in a
19 second decision after the EEOC overturned
20 Bouffard, okay, and then the MSPB certified it to
21 us they seemed to no longer think they needed to
22 defer. How can they -- I guess how can they have
23 it both ways and how is that due deference? I
24 mean our statute says we have to give due
25 deference. Well, the MSPB seems to have given due

1 deference once and no deference the second time.

2 How can they have it both ways?

3 MR. ACURI: Well, you had a case right
4 on point there that they were looking at from the
5 EEOC. It was -- in 2010 when this hearing took
6 place you had (inaudible) to take a look at -- it
7 wasn't the only thing that the AJ did look at, but
8 it was the law that was --

9 MR. WALSH: It was pretty dispositive in
10 the decision.

11 MR. ACURI: It certainly was considered
12 heavily, absolutely. And then what's happened is
13 many years later after the fact finder had the
14 ability to contemplate the testimony of the
15 individual witnesses you have a reversal. And --

16 MS. WAGNER: I'm sorry, can I jump in on
17 this too?

18 MR. WALSH: Which agencies do all the
19 time.

20 MS. WAGNER: Which is that -- if I can
21 clarify perhaps the position of the Board in this.
22 In the first instance the EEOC conducted a case by
23 case analysis of whether the asserted functions
24 that the Border Patrol was relying upon were
25 essential and we would defer to that. But once

1 the EEOC issued a categorical exclusion of certain
2 aspects of terms and conditions of employment and
3 such fundamental ones as time and attendance from
4 ever being considered to be essential, that was an
5 encroachment on civil service law and that did not
6 warrant deference by the Board to the EEOC's
7 determination.

8 MR. WALSH: I think she's answered your
9 question for you.

10 MS. WAGNER: I just wanted to help him.

11 MR. ACURI: Thank you.

12 MR. WALSH: So we can proceed to
13 rebuttal. For the appellant.

14 MR. HADLEY: Thank you. Very briefly,
15 and then I'm going to turn this over to Mr.
16 Gilbert. Chairman Walsh, I think you've hit on
17 one of the principle points here, and it in fact
18 is one that was referenced in page 4 of Peter
19 Broida's amicus brief. Alvara and other litigants
20 before the Board cannot be expected to guess at
21 the Board's intent, quote, "defense with a
22 phantom, raising arguments with himself, merely
23 for the exercise of encountering those arguments,
24 end quote, in Ray Terrella 1-MSPR-119, back from
25 1979, that's what we've been forced to do in this

1 case, because there's never been an identification
2 of a specific civil service law, rule or
3 regulation that the EEOC incorrectly interpreted
4 in its decision. As for 7106, that's the -- we're
5 here -- this will be the fifth written decision in
6 this case, and it's the first time that's been
7 raised as an issue. I think that may be a
8 question of due process, as to whether or not it
9 can either be raised at this point. Second, the
10 reason we defer to the commission or the board in
11 these cases, is respective expertise -- 7106 falls
12 within the jurisdiction of the Federal Labor
13 Relations Authority, not the MSPB. And they're
14 the primary authority on that. Now it's not an
15 issue properly before this panel. I yield to Mr.
16 Gilbert.

17 MR. GILBERT: If my -- my apologies --
18 if my client had been a probationary employee at
19 the time that he requested the accommodation, we
20 wouldn't be here, and that is as conclusive
21 evidence that there can be that this does not
22 involve an interpretation of civil service law.
23 It would have gone to the commission because the
24 board would have had no jurisdiction. The
25 Commission has no authority to interpret civil

1 service laws, but the Commission would have been
2 able to make a determination in this case.

3 Chairman Walsh, I believe you actually hit the
4 analysis of this case right on the nail here,
5 echoing to some extent what Commissioner Feldblum
6 commented, and that is that the question of
7 whether my client could be accommodated in this
8 job was a question of undue hardship. The
9 government had every opportunity to present
10 evidence of that fact at trial. They presented
11 their evidence. It was, by my view, fairly
12 meager. It is true that the Commission has
13 repeatedly said that one of the things we look at
14 is the number of persons available to perform a
15 task to determine whether it's an essential
16 function of the job and just by comparison, the
17 Board, the Commission has said multiple times as
18 an example, if you have a small post office, my
19 colleague Ernie Hadley lives in an area that has a
20 post office with two employees. Lifting 70 pounds
21 may well be an essential function of the job, the
22 ability to lift itself, lifting 70 pounds, may be
23 essential to that job. But here in Washington,
24 D.C. we have a post office that has over a
25 thousand postal employees and the ability for an

1 individual who possibly never lifts 70 pounds
2 during the course of a month, they can turn to a
3 colleague and say, can you lift this bag. That is
4 exactly the ready why, from the very beginning of
5 its enactment in 1973, the Rehabilitation Act was
6 required a case by case analysis, not just of the
7 individual's disability, but also of the position
8 itself to determine what are essential functions.

9 MR. WALSH: Okay I know Commissioner
10 Feldblum has a question, but I just wanted to just
11 clarify one thing factually very quickly and that
12 is, can you just tell, for my benefit, what
13 exactly was the accommodation that Mr. Alvara was
14 seeking?

15 MR. GILBERT: Yes, the accommodations he
16 requested was to group his overtime, generally
17 speaking so it was in blocks of four hours and
18 also to be excused from working the graveyard
19 shift. There is nothing in the record, by the
20 way, there is nothing in the record as to whether
21 on a particular occasion, we had a 9-11, we had a
22 Katrina, or something of that nature, there is
23 nothing in the record that indicates whether on a
24 single occasion, or multiple occasions, whether he
25 could or not. This was an accommodation to allow

1 him to have a regular sleep cycle that is an
2 accommodation requesting that he have a regular
3 schedule. And the agency would have indeed been
4 able to do that. And you raised a comment.

5 MR. WALSH: You had a question.

6 MS. FELDBLUM: Yes.

7 MR. GILBERT: Yes.

8 MS. FELDBLUM: Isn't it true that the
9 issue of how many other employees exist occurs at
10 two parts in the statute. If you're trying to
11 figure out whether something is an essential
12 function or a marginal function, then how many
13 employees are available, is just right there in
14 the regulation or something that you look at,
15 correct?

16 MR. GILBERT: That's correct.

17 MS. FELDBLUM: And, but if, as the EEOC
18 has said, I believe since 2002 in its enforcement
19 guidance, that when a particular job duty is
20 performed, that is dealt with as whether it's a
21 valid job requirement or a qualification standard,
22 and then the question is, is modifying that
23 requirement an undue hardship and there again,
24 whether it's an undue hardship or not, the number
25 of people that would be involved would be taken

1 into account. Is that correct? That it's
2 imposed?

3 MR. GILBERT: I think not surprisingly,
4 that is precisely the Commission's guidance,
5 that's correct.

6 MS. FELDBLUM: Okay, so then on the
7 question of the radical aspect as of the EEOC
8 dealing with things like actually either timing or
9 lifting requirements, isn't it true then in a case
10 that was cited in both briefs, complainant versus
11 USPS, the Todd case, the Agency tried, argued that
12 a 70 pound lifting requirement was an essential
13 function --

14 MR. GILBERT: That's correct.

15 MS. FELDBLUM: And the EEOC in its
16 decision said, actually both the Agency and the
17 Complainant argued in that way, and isn't it true
18 that the EEOC said, based on their long standing
19 guidance, that's not the correct legal way to
20 analyze this. The question is, is lifting 70
21 pounds a valid qualification standard?

22 MR. GILBERT: That's correct. That
23 case, there were qualification standards, that's
24 correct. It did not address the question of an
25 essential function of that particular job, that's

1 correct.

2 MS. WAGNER: Mr. Gilbert, can I, again,
3 looking to the EEOC regs, it talks about, under
4 essential functions, and it says, a function may
5 be essential because the limited number of
6 employees available among whom the performance of
7 that job function can be distributed, but it
8 doesn't, again, the converse isn't there, which is
9 that if you have a lot of employees able to
10 perform the function, it doesn't necessarily make
11 it not essential.

12 MR. GILBERT: Sure, it is true that just
13 because -- merely because of the fact that there
14 are other individuals that can perform the job, I
15 would agree with you Vice Chair Wagner, that does
16 not necessarily mean -- I'll give you the example.
17 Firing a weapon -- firing a weapon is essential to
18 law enforcement position, and whether there's
19 other people to fire it or not, that's different
20 than the fact that I'm here. And in fact, let me
21 just correct the record, because I think counsel
22 misstated the record here. Nothing in the job
23 description of the position vacancy requires that
24 an individual in fact work the graveyard shift.
25 In fact the language says, the document says, due

1 to the unique functions of the job, the officer
2 may work extended or unscheduled hours including
3 weekends and holidays and be required to rotate
4 shifts, assignments and duty stations. May, it
5 doesn't say that they will. In addition to that,
6 the Agency could, if they -- the Agency certainly
7 could have done the following. They could have
8 had three separate shifts, and they could have
9 hired people for each of the three shifts and if
10 they wanted to change shifts, they could have had
11 them compete. And then the job description would
12 be unique to those shifts. There is no civil
13 service law that would have precluded them from
14 doing that. And in those circumstances --

15 MS. WAGNER: No but there is the civil
16 service law that says it's the agency has
17 authority and prerogative to devise shifts as he
18 or she sees fit, right?

19 MR. GILBERT: They have the right to
20 assign work that's correct. But the point is that
21 if they had done that, that certainly would have
22 been permissible in the law and this issue would
23 never have arisen. But there's also the issue
24 that in this instance, the agency excuse -- you
25 know either a job task is an essential function or

1 it's not. And if you -- if the agency took other
2 individuals and said for a period of two years and
3 nine months, which the agency conceded and I think
4 has been the well cited examination I did of the
5 deciding official here, they conceded that some
6 women are excused from working graveyard shift for
7 nine months while they're pregnant and two years
8 -- two years after that.

9 MS. WAGNER: But Mr. Gilbert, I'm really
10 saying that agency's flexibility in applying terms
11 and conditions in employment should be used as
12 evidence that they don't necessarily consider
13 those terms and conditions to be essential.

14 MR. GILBERT: I'm sorry, but that's
15 precisely what the law says, and every Federal
16 court that has addressed that has said that. The
17 fact is that is we -- if you defer, the
18 interpretation of the Board, the Board's decision
19 in this case, would negate in its entirety the
20 Commission's guidelines on this matter. It would
21 say that the question of what the essential
22 functions are should not be determined as the
23 Commission has said in its well-reasoned decision
24 by a series of considerations, including only as
25 one, the employer's judgment, which is given

1 consideration but which is not determinative, and
2 you would have an interpretation --

3 MS. WAGNER: But it's categorically
4 being --

5 MR. GILBERT: The Board's determination,
6 the Board's decision, it would negate that in its
7 entirety, and it would say that employers can
8 determine what the essential functions are, and
9 that those are not able to be challenged. That's
10 not what the statute says.

11 MS. WAGNER: No that's not what the
12 Board said.

13 MR. WALSH: I'm not sure what the Board,
14 it's not what the Board said.

15 MS. WAGNER: But what I think the EEOC's
16 decision said is that they're essentially writing
17 out the employer's identification and the position
18 description which are in its regulations as being
19 bases for finding that function is essential.

20 MR. GILBERT: Not at all, in this
21 particular instance, the Commission's decision
22 says that under the facts of this particular case,
23 under the facts as presented in this particular --

24 MS. WAGNER: It says time and attendance
25 shall never be considered.

1 MR. GILBERT: That's not with the
2 Commission decision says, it's not -- it says that
3 it's not determinative of the essential functions
4 in and of itself. The fact is that the
5 Commission's decision says that under the facts of
6 this case, the evidence shows that it was not an
7 essential function of the position. Now the only
8 question is, could the employer have accommodated
9 our client in the manner that was discussed? And
10 the Commission found that there was evidence that
11 it could have --

12 MR. WALSH: I'm not sure, but what Vice
13 Chair Wagner has a point though that the
14 Commission effectively removed it from the
15 essential functions category and shifted it over
16 to the undue hardship category.

17 MR. GILBERT: Under the facts of this
18 case.

19 MR. WALSH: I'm not sure that's the
20 case. I mean they were pretty categorical.

21 MR. GILBERT: About attendance in
22 general.

23 MR. WALSH: Right.

24 MR. GILBERT: Yes, but the guide -- the
25 Commission's decision clearly says that you should

1 not consider attendance in an of itself as an
2 essential function. It says that does a
3 disservice and that is our -- and this is within
4 the purview of the EEOC and again the issue before
5 this panel --

6 MR. WALSH: Maybe that's what
7 Commissioner Wagner is saying the Board objects
8 to.

9 MR. GILBERT: It may object to it, but
10 it's a reasonable interpretation and the only
11 issue before the panel here, is whether there is
12 evidence whether the Commission's decision is
13 supported by the record, nothing more.

14 MR. WALSH: Thank you. Thank you.

15 MR. GILBERT: Thank you.

16 MR. NAHRGANG: Good afternoon. May it
17 please the special panel, my name is Lamont
18 Nahrgang with Peter Acuri, I represent the Agency
19 in this matter and have from the very beginning.
20 What's being completely ignored here today in all
21 the argument and I think it's being ignored by the
22 Commission as well as the appellant for a reason
23 is ordered over time. Everybody wants to focus on
24 whether or not we can -- well he doesn't have to
25 work, it's only one of shifts, there's only seven

1 percent of the people that work these shifts,
2 therefore how can it be essential and this is
3 flawed logic, and it's so flawed that --

4 MS. FELDBLUM: So let me just ask in
5 terms of the reasonableness of the EEOC's dealing
6 with this under the undue hardship analysis. So I
7 want to ask you this same question. Do you agree
8 that special requirements of the CBO position
9 include carrying a fire arm, and presumably firing
10 it, possessing a valid state driver's license,
11 working shifts on a rotating basis, performing a
12 substantial amount of overtime? So would you
13 agree that these are part of the requirements of
14 the job?

15 MR. NAHRGANG: I do but --

16 MS. FELDBLUM: Okay, so do you also
17 agree that since 2002 the EEOC in its enforcement
18 guidance have said that requirements of a job,
19 such as being physically present or presumably
20 working overtime, the requirements of a job,
21 should never be viewed as an essential function,
22 but rather should be viewed as job requirements of
23 a job? Do you agree that that's what the EEOC has
24 said since 2002?

25 MR. NAHRGANG: I believe that's what

1 they have said. I think that what the EEOC would
2 like to --

3 MS. FELDBLUM: Okay, I just want to go
4 to in terms of what the reasonableness of where we
5 place this. So you agree that since 2002 the EEOC
6 has made a distinction between the duties of a
7 job, the essential duties, and do you also agree
8 that under the law, once something is determined
9 to be an essential function, that cannot -- no
10 employee can ask as a reasonable accommodation
11 that that essential function be removed. Do you
12 agree that as a matter of law, once something is
13 decided to be an essential function, that's the
14 end of the story? You cannot ask as a reasonable
15 accommodation to remove that essential function.
16 Do you agree that that's the law?

17 MR. NAHRGANG: That they would not be a
18 qualified individual if they cannot --

19 MS. FELDBLUM: Correct, they would not
20 be qualified if what they were asking for is --

21 MR. NAHRGANG: Do essential functions,
22 yes.

23 MS. FELDBLUM: Correct, okay. So are
24 you also aware that into, again, this is just to
25 the reasonableness of the fact that the EEOC is

1 deciding this undue hardship and making the
2 individual assessment. What do you make of
3 decisions like Tah, the postal service where the
4 Agency argued very vigorously that being able to
5 lift 70 pounds was an essential function, such
6 that if you couldn't do it, that was it or Nathan,
7 which was a law enforcement case, where the FBI
8 argued very strenuously that being able to see 20
9 20 was an essential function and in both cases
10 that the EEOC decided it under an undue -- under,
11 either was it justified, was it this job
12 requirement justified in the first place, or even
13 if it was, like in the Vision standard, was there
14 an accommodation. So again, this is all towards
15 the reasonableness of the EEOC deciding Alvarez it
16 did.

17 MR. NAHRGANG: I think the EEOC split an
18 unbelievable hair because the essential function
19 is not the ability. It's working substantial lobe
20 types, actually protecting the border at night is
21 not an ability. It's something that they do. And
22 that's the essential function -- protecting the
23 border in the middle of the night, and then back
24 to my original -- ordered overtime was completely
25 ignored by everybody. These folks get ordered to

1 stay 8 hours. So even if Mr. Alvara can work the
2 two to ten shift, because that's an available
3 shift for him, he can't be ordered to stay and to
4 work 8 hours.

5 MR. WALSH: He offered to work a
6 substantial amount of overtime though, he offered
7 to work twelve hour shifts, I mean, as part of his
8 accommodation, I think that's what I just
9 clarified, that he offered to work four hours of
10 overtime a day.

11 MR. NAHRGANG: However, again, Your
12 Honor, these things -- ordered overtime is not
13 done that way, or ordered overtime is done at the
14 end of a shift, often times for either very, very
15 big reasons or very mundane reasons, that they
16 have to order folks to work two hours, four hours
17 and eight hours --

18 MR. WALSH: As I understand under his
19 accommodation though, the only ordered overtime he
20 would not be willing to accept would be between 12
21 AM and 6 AM.

22 MR. NAHRGANG: Well I would posit that
23 the eight hour -- what he's really required and
24 was factually not correct in the EEOC's decision
25 was -- we was requiring eight hours of sleep every

1 night, and he's disabled, therefore the Agency has
2 to give this to him. You know, he's disabled. He
3 cannot work that eight hours.

4 MR. WALSH: Between 12 and 6.

5 MR. NAHRGANG: That's not eight hours.
6 That's six hours, hence, he has to have eight
7 hours of nocturnal sleep, he has to have travel,
8 he has to have --

9 MR. WALSH: Maybe I have the hours
10 wrong, but he can't work the overnight shift.

11 MR. NAHRGANG: Right, so if he's working
12 the two to ten, he can't work --

13 MR. WALSH: So if he's working eight
14 hours --

15 MR. NAHRGANG: He can't work
16 additionally beyond that.

17 MR. WALSH: That's right, so it's just
18 -- he wouldn't be able to take overtime during the
19 overnight shift.

20 MR. NAHRGANG: That's correct.

21 MR. WALSH: Okay.

22 MR. NAHRGANG: And when everybody else
23 would, or when he was ordered and when management
24 needed him to be there for very important reasons
25 that --

1 MR. WALSH: They needed someone to be
2 there.

3 MR. NAHRGANG: That's correct.

4 MS. WAGNER: Counsel, they OPM
5 regulations provide that the head of an agency
6 shall schedule the work on his or her employees to
7 accomplish the mission of the agency. So are you
8 -- are you saying that scheduling overtime or
9 ordering unscheduled overtime is part of that
10 authority to schedule the work of employees within
11 your agency?

12 MR. NAHRGANG: Yes, that is the agency's
13 position. Additionally, the position is that the
14 EEO's decision in this case is so flawed, so
15 flawed in the outcome, that it does in and of
16 itself violate civil service law, which is one of
17 the two standards.

18 MR. WALSH: Let me ask you that in terms
19 of the legal question. We have to look at
20 reasonableness here. And that's really our
21 guidepost. If we get beyond the first question we
22 have to answer about whether there's a civil
23 service law that's even being misinterpreted.
24 Second question is we have to say, is was it
25 reasonable. Well in making this decision, the

1 EEOC relied on its own policy guidance, as guided
2 by Federal case law. I mean, I've read the
3 guidance, we've all read the guidance. They have
4 very capable staff people. They've all looked
5 into the case law and they looked at what they've
6 done and what the cases they've seen. They
7 clearly relied on their policy guidance. Why
8 isn't that reasonable? Why isn't that enough for
9 us? We have to give due deference to the EEOC.
10 Why isn't that enough?

11 MR. NAHRGANG: The Agency's position is
12 they didn't rely on their own guidance at all. In
13 their decision they said, they simply said, we
14 don't have to follow what the Agency puts in the
15 position description, so since we don't have to,
16 then we're going to do something different, and in
17 the --

18 MR. WALSH: With all due respect that's
19 not accurate that they didn't rely on their
20 guidance. They said that the Bouffard decision
21 was clearly antithetical to their guidance, so
22 they relied on their guidance.

23 MR. NAHRGANG: However they did give --
24 what could the Agency have done Chairman Walsh?
25 They give guidance on the things to be considered,

1 all of the different things to be considered in
2 1614, or excuse me, 1630, of how to determine it.
3 And then they only look at one thing and they say,
4 in this case, you know, we're going to look at one
5 thing and since we don't agree with it, we don't
6 have to; we're going to move on.

7 MS. FELDBLUM: No, but this was my
8 question again. All that stuff about how to
9 decide whether something was an essential
10 function, I mean isn't it -- wouldn't it be
11 obvious that the EEOC wouldn't be looking at all
12 those factors if they've already said, starting
13 from their 2002 guidance, as well as in more
14 recent cases, that's the wrong place in this
15 statute to be looking.

16 MR. WALSH: Right.

17 MS. FELDBLUM: It's not inherently an
18 essential function, because you can never as an
19 accommodation remove that, so it would mean by
20 inherently, someone who couldn't do what is really
21 a job requirement under the law must be modified
22 unless it would impose an undue hardship. I mean,
23 why would the EEOC be looking at a part of this
24 statute and regulations that it's already said is
25 not relevant to this question and has said that

1 for some time.

2 MR. NAHRGANG: Because it's not because
3 they split the hair and they say, ability is not
4 outcome, and they can forget about their also
5 guidance on duty and the duty is to protect the
6 border at night. If you use the analogy of a
7 weapon, it says the ability to carry a weapon. In
8 the situation, you can do the identical analysis
9 that's been done and a person goes in and says, I
10 cannot go in and carry a weapon anymore, because
11 my doctor says that I can't, and but carrying a
12 weapon is not an outcome, that's not a thing, but
13 --

14 MS. FELDBLUM: I think in the sentence I
15 read that carrying a weapon and firing a weapon
16 would be part of the job requirements, not -- the
17 essential duty is to protect people, the essential
18 outcome right?

19 MR. NAHRGANG: Right.

20 MS. FELDBLUM: So I think with all due
21 respect to Mr. Gilbert that firing a weapon would
22 certainly be a job requirement and that it's hard
23 to see how it wouldn't be an undue hardship to
24 take that away.

25 MR. NAHRGANG: Actually it wouldn't,

1 because if there's enough people, they could
2 simply absorb that and they do and
3 non-permanently.

4 MS. FELDBLUM: The person is on the job?
5 While the person is on the job, to give that over
6 to someone else?

7 MR. WALSH: Yeah, I think that's a
8 little different.

9 MR. NAHRGANG: The Agency's position is
10 that it's not. They do it non-permanently all the
11 time. They take away people's weapons and they
12 find things for them to do.

13 MS. WAGNER: Again, if I could just, I
14 mean, the idea isn't that any given case, that
15 might not be true, but that to categorically
16 divorce the when of the, when the activity has to
17 be performed, from the activity, seems artificial
18 at best, and I'm not sure if it is reasonable.

19 MR. WALSH: Yeah, it may be artificial,
20 but I still don't understand why -- it's not
21 categorical in the sense that you can never get
22 out of this, okay? You get out of it by showing
23 an undue hardship. I mean, that's your out. So
24 it's not categorical, it's not never. You know,
25 if you show an undue hardship because you have to

1 accommodate someone's shift desire, it's not
2 categorical, it's --

3 MR. NAHRGANG: But the --

4 MR. WALSH: You had the opportunity to
5 show it and you didn't.

6 MR. NAHRGANG: There was tons --
7 actually there was evidence in the record, tons of
8 evidence that was ignored in the Commission's
9 decision, evidence of everything that hit
10 essential function as well as evidence that this
11 wasn't a hypothetical that it was an undue
12 hardship. The reason they had the meeting in the
13 first place was because it was a hardship. They
14 had a percentage of the population out and that
15 was causing a hardship and so now, that's why they
16 had the meeting in the first place.

17 MR. WALSH: But seeing that
18 accommodation is always going to be a hardship on
19 someone. The question is, have you proven it was
20 an undue hardship? The question for us is, was it
21 unreasonable for the EEOC to say you didn't prove
22 it?

23 MR. NAHRGANG: Again, the Agency's
24 position is that it is an essential function
25 that's needed for law enforcement officers to do.

1 MR. WALSH: Okay, thank you. I believe
2 all the time has been expired but we have
3 something that we have to kind of spring on you
4 now I'm afraid. No that's okay, this is for
5 everyone. And I'm going to defer to Vice Chair
6 Wagner on this, but there has been an issue that
7 the folks at the MSPB have raised sua sponte that
8 you have no reason to know about because they
9 raised it sua sponte and we only learned about it
10 ourselves in the last couple days. And we're
11 going to need probably some briefing on it. It's
12 kind of a -- it's not -- it's an issue that's
13 somewhat peripheral to the issues we've been
14 talking about today, so I'm going to let Vice
15 Chair Wagner talk about it.

16 MS. WAGNER: Thank you Chairman Walsh.
17 In preparing for this proceeding, we were
18 undertaking an extensive review of the record of
19 the case and became aware of the fact, that when
20 the presiding official testified at the hearing,
21 she testified to some degree at length about the
22 fact that she had considered the collective
23 bargaining agreement in deciding that the
24 appellant failed to meet the physical requirements
25 of the position and therefore sustained the charge

1 of removal. Under Stone vs. FDIC which is
2 controlling authority decision of the Federal
3 Circuit, a deciding official's consideration of
4 information without notifying the appellant that
5 the information is being considered and giving the
6 appellant an opportunity to respond to that
7 information, is a due process violation, and the
8 Board has uniformly ordered reversal of an adverse
9 action if the appellant was not provided adequate
10 notice and an opportunity to respond. So at this
11 juncture, we're reviewing the decision in this
12 process to see what the impact, if in fact we do,
13 upon examination of the record and legal analysis
14 conclude that the appellant was denied due
15 process, we will consider vacating the initial
16 decision. What impact that has on this proceeding
17 is in question, so it -- Chairman, if you want to
18 --

19 MR. WALSH: We really need some briefing
20 on this because I have some serious questions
21 about the MSPB's jurisdiction to take the case
22 back at this point and I'd like your view about
23 that. Also, does -- if they do have the authority
24 and that goes in a question of whether there is an
25 MSPB final decision yet, that can be taken back,

1 and also your view on what would be the effect of
2 this? What's the consequence if they should -- if
3 they do have that authority, and if they exercise
4 it to vacate the decision, does that mean that the
5 panel, we as a panel, don't need to make our
6 decision or can both decisions exist at the same
7 time? I mean, these are all kind of uncharted
8 territory. And so we need your views on the
9 jurisdictional question and I guess on the merits
10 of the Board's view of this. It's not in my view;
11 it's not the panel's job to determine this due
12 process issue. It would have to be taken back by
13 the MSPB, in order for it to be determined. This
14 is not under 7702; this is not in our purview to
15 make such a decision. So we need to know whether
16 the MSPB can take it back and what's the effect of
17 taking it back if they can. And we would like
18 briefing on this, in an hour if possible.

19 (Laughter)

20 MR. WALSH: Actually, we do have a tight
21 time frame and the whole panel intends to meet our
22 statutory time frame of getting this decision out
23 in 45 days, so we will expect a briefing on this
24 issue in a week, a week from today, and
25 electronically if you could. And I think -- yes

1 --

2 MR. GILBERT: Can you clearly state the
3 issues exactly? I apologize.

4 MR. WALSH: I wish I could.

5 MR. GILBERT: So we know what we're
6 briefing exactly and what you're expecting or
7 something?

8 MR. WALSH: Excuse me?

9 MR. GILBERT: Or can we get an order?
10 Sorry.

11 MR. WALSH: Well I will clearly as I can
12 state the jurisdictional question. The
13 jurisdictional question for the special panel is
14 -- is there a less than final decision of the MSPB
15 that the MSPB has the authority to take back and
16 to vacate if they so -- if they deem appropriate.
17 And if so, what does that mean for, in terms of
18 what we need to do next, the special panel,
19 whether we should go forward and issue our
20 decision. Those are what I would like to see
21 briefed. Is that okay?

22 MS. WAGNER: That's -- yes.

23 MR. WALSH: Okay. I believe that,
24 unless there's other questions from the panel, I
25 believe that concludes our session today. Again,

1 I want to thank the NLRB and I want to thank the
2 parties for a very interesting argument.

3 MS. WAGNER: Thank you.

4 MR. WALSH: Thank you very much.

5 (Whereupon, at 5:44 p.m., the
6 PROCEEDINGS were adjourned.)

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1 CERTIFICATE OF NOTARY PUBLIC

2 I, Jay C. Anderson, as the reporter, hereby

3 certify that the attached proceeding

4 before

5 the Panel of the U.S. Merit Systems Protection

6 Board, in the matter of

7 REYNALDO ALVARA v. DEPARTMENT OF HOMELAND SECURITY

8 MSPB No. DA-0752-10-0223-E-1

9 EEOC Petition No. 0320110053

10 Washington, D.C.

11 September 8, 2014

12 was held as herein appears and that this is the

13 original transcript thereof and that the

14 statements that appear in this transcript were

15 stenographed by me to the best of my ability. I

16 also certify that this transcript is a true and

17 accurate record of the proceedings.

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