UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 75

Docket No. AT-0353-11-0063-I-1

Jacqueline Ashley,
Appellant,
v.
United States Postal Service,
Agency.

June 28, 2012

Dexter L. Mattear, LauderHill, Florida, for the appellant.

Barry D. Thorpe, Miami, Florida, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision that denied her restoration appeal on the merits. For the reasons set forth below, we REVERSE the initial decision and ORDER the agency to restore the appellant.

BACKGROUND

¶2 The appellant is a City Letter Carrier with the agency. Initial Appeal File (IAF), Tab 1. On July 21, 2004, she suffered an on-the-job injury to her back and on August 4, 2004, the Department of Labor's Office of Workers' Compensation Programs (OWCP) accepted her claim for lumbar strain as a compensable injury. IAF, Tab 10 at 55-58. Beginning on December 28, 2004, the agency afforded the

appellant a number of limited duty modified assignments for eight hours a day. *Id*. at 45, 48, 51. These assignments were not in her position of record. *Id*. On August 12, 2010, the agency discontinued the appellant's most recent modified assignment pursuant to the National Reassessment Process (NRP). *Id*. at 26. The agency issued the appellant a letter informing her that, under NRP guidelines, it was unable to identify any operationally necessary tasks within her medical restrictions and that she should not report back to work unless she was contacted by the agency. *Id*.

¶3 The appellant filed a Board appeal on October 13, 2010,[1] alleging that the agency denied her restoration rights, discriminated against her on the basis of disability, and committed harmful procedural error by issuing the no-work available letter when her facility area's union steward was not available and a union steward from a different area was present. IAF, Tab 1. After holding the appellant's requested hearing, the administrative judge issued an initial decision that denied the appellant's request for restoration. IAF, Tab 20. He found that the appellant was absent from her position due to a compensable injury, was a

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[1] On August 16, 2010, the appellant contacted an equal employment opportunity (EEO) counselor alleging disability discrimination and, on September 15, 2010, she received a letter of final counseling. IAF, Tab 1. The letter advised the appellant that her case had been identified as a potential mixed-case under the Equal Employment Opportunity Commission's regulations, that she may file a formal complaint of discrimination within 15 days, and that she may have the right to file a Board appeal. *Id*. The appellant did not file a formal complaint.

Under the Board's regulations, the time limit to file a Board appeal is 30 days from the date of the agency's action, here August 12, 2010. 5 C.F.R. § 1201.22(b). Contacting an EEO counselor does not waive that time limit. *See* 5 C.F.R. § 1201.154(a). Thus, the appellant's Board appeal, filed on October 13, 2010, based on the agency's August 12, 2010 action, was untimely. The administrative judge did not advise the appellant that her appeal appeared to be untimely. However, because the agency failed to apprise the appellant of her Board appeal rights when it discontinued her modified assignment and the appellant filed her Board appeal within 30 days of the date that she received notice that she may have the right to appeal to the Board, we waive the filing deadline for good cause shown.

partially recovered employee who could return to duty on a part-time basis or in a position with less demanding physical requirements than those previously required of her, and the agency denied her request for restoration when it sent her home after issuing the August 12 letter. *Id*. at 6. He found, however, that denying the appellant restoration was not arbitrary and capricious because no operationally necessary tasks within her medical restrictions were available at an agency facility within a 50-mile radius of her duty station. *Id*. at 8-10.

¶4 The administrative judge also found that the appellant failed to prove her affirmative defenses. He found that the appellant did not identify any vacant position within or outside of her craft consisting of duties that she could perform within her medical restrictions, even with reasonable accommodation. *Id*. at 13. Additionally, he found that the appellant failed to show that the agency had an obligation to provide her with a specific union steward when it issued the no-work available letter and that, even if the agency had such an obligation, the appellant failed to show that it would have reached a different conclusion in the absence of such violation. *Id*. at 14.

¶5 The appellant has petitioned for review. Petition for Review (PFR) File, Tab 1. The agency has responded in opposition to the petition. PFR File, Tab 3.

ANALYSIS

¶6 In order to establish jurisdiction over a restoration appeal as a partially recovered individual, an appellant must prove by preponderant evidence that: (1) She was absent from her position due to a compensable injury; (2) she recovered sufficiently to return to duty on a part-time basis or to return to work in a position with less demanding physical requirements than those previously required of her; (3) the agency denied her request for restoration; and (4) the denial was arbitrary and capricious under 5 C.F.R. § 353.301(d). *Bledsoe v. Merit Systems Protection Board*, 659 F.3d 1097, 1104 (Fed. Cir. 2011); *Latham v. U.S. Postal Service*, 117 M.S.P.R. 400, ¶ 10 (2012).

¶7 Further, the Board has jurisdiction over appeals concerning denials of restoration to partially recovered individuals where the denial results from a violation of the agency's own internal rules. *Latham*, 117 M.S.P.R. 400, ¶ 13. An agency's failure to adhere to its substantive restoration obligations to a partially recovered employee under 5 C.F.R. § 353.301(d), including any restoration obligations that it has voluntarily adopted, is per se "arbitrary and capricious" within the meaning of 5 C.F.R. § 353.304(c), the regulation affording the right to a Board appeal for a determination of whether the agency is acting arbitrarily and capriciously in denying restoration. *Latham*, 117 M.S.P.R. 400, ¶ 16. Under the Postal Service Employee and Labor Relations Manual (ELM) and Postal Service Handbook, the Postal Service may discontinue a modified assignment consisting of tasks within an employee's medical restrictions only where the duties of that assignment no longer need to be performed by anyone or those duties need to be transferred to other employees in order to provide them with sufficient work. *Latham*, 117 M.S.P.R. 440, ¶ 31 (overruling *Soto v. U.S. Postal Service*, 115 M.S.P.R. 95, ¶ 11 (2010) and *Hunt v. U.S. Postal Service*, 114 M.S.P.R. 379, ¶ 11 (2010)). Postal Service restoration rules obligate it to offer modified assignments to partially recovered individuals when the work is available regardless of whether the duties constitute those of an established position. *Id.*, ¶¶ 25-26.

¶8 It is undisputed that the appellant here has satisfied the first three jurisdictional elements by preponderant evidence. Thus, the ultimate issue is whether the appellant has proven by preponderant evidence that the denial of restoration was arbitrary and capricious. The following line of inquiry set forth in *Latham* is a relevant framework for analyzing whether the agency acted arbitrarily and capriciously in ending the appellant's modified assignment: (1) Are the tasks of the appellant's former modified assignment still being performed by other employees? (2) If so, did those employees lack sufficient work prior to absorbing the appellant's modified duties? (3) If so, did the

reassignment of that work violate any other law, rule, or regulation? *Latham*, 117 M.S.P.R. 400, ¶ 33.

¶9 In this case, we find it immaterial that the appellant's modified assignment did not consist of the essential functions of an established position. *See Latham*, 117 M.S.P.R. 400, ¶¶ 25-26, 41. Furthermore, we find that there is no evidence to show that the duties of the appellant's most recent modified assignment have gone away. Those duties included "PO Box casing mail, closing and opening, AMD, Lobby Directing, 2nd notices and return to sender mail." IAF, Tab 17, Subtab C at 6. In fact, the record shows that those duties were being performed on a daily basis by clerk craft employees or management personnel. *Id*. at 12. Further, there is no evidence that there was a lack of work for clerk craft employees or management personnel at the time the agency discontinued the appellant's modified assignment. According to a statement from a former coworker, the facility where the appellant worked is "often late on second notices, return parcels and Freedom of Information." *Id*., Subtab A. That assertion was unrebutted by the agency. For these reasons, we find that the appellant has established by preponderant evidence that the discontinuation of her modified assignment violated the agency's rules regarding its modified duty obligations. We therefore find that the Postal Service's discontinuance of the appellant's modified duty assignment constituted an arbitrary and capricious denial of restoration.

¶10 Regarding the appellant's claims of disability discrimination and harmful procedural error, we agree with the administrative judge that the appellant failed to prove these claims.[2] We have reviewed the remainder of the appellant's

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[2] Although the agency's basic restoration obligation under 5 C.F.R. § 353.301(d) is more or less coextensive with the Rehabilitation Act, it is not entirely the same. *See Sanchez v. U.S. Postal Service*, 114 M.S.P.R. 345, ¶¶ 16–18 (2010). Therefore, a violation of one does not necessarily entail a violation of the other. This is particularly true in the case of the Postal Service, whose restoration obligations go beyond the requirements of the Rehabilitation Act to the extent that they mandate the creation of

arguments on petition for review regarding the administrative judge's evidentiary rulings and handling of the appeal, and we find them to be without merit.

ORDER

¶11 We ORDER the agency to restore the appellant effective August 12, 2010. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶12 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Back Pay Act and/or Postal Service Regulations, as appropriate, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶13 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶14 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not

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modified assignments. *Cf. Marino v. Office of Personnel Management*, 243 F.3d 1375, 1377 (Fed. Cir. 2001) (permanent assignment to light duties is not an accommodation allowing an employee to perform the essential functions of his position).

fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶15 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

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

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. § § 1201.201, 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

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

Discrimination Claims: Administrative Review

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

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

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

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

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

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a

representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

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

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in

Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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

DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
   a. Outside earnings with copies of W2's or statement from employer.
   b. Statement that employee was ready, willing and able to work during the period.
   c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts**.**

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.

2. The following information must be included on AD-343 for Restoration:

a. Employee name and social security number.
b. Detailed explanation of request.
c. Valid agency accounting.
d. Authorized signature (Table 63)
e. If interest is to be included.
f. Check mailing address.
g. Indicate if case is prior to conversion. Computations must be attached.
h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)

2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.

3. Outside earnings documentation statement from agency.

4. If employee received retirement annuity or unemployment, provide amount and address to return monies.

5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)

6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

a. Must provide same data as in 2, a-g above.
b. Prior to conversion computation must be provided.
c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.