**UNITED STATES OF AMERICA**
**MERIT SYSTEMS PROTECTION BOARD**

**2011 MSPB 95**

Docket Nos. DE-0752-10-0137-I-1
DE-0752-09-0095-I-3

**Sigiefredo Sanchez,**

**Appellant,**

**v.**

**Department of Energy,**

**Agency.**

November 22, 2011

Mark C. Dow, Esquire, Albuquerque, New Mexico, for the appellant.

Saul Ramos, Albuquerque, New Mexico, for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

## OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision that sustained the agency's actions indefinitely suspending and removing the appellant. For the reasons set forth below, we GRANT the petition for review and REMAND the appeals to the regional office for further adjudication consistent with this Opinion and Order.

## BACKGROUND

¶2 The appellant held the position of Emergency Operations Specialist in the Transportation and Emergency Control Center of the Agency's National Nuclear Security Administration Office of Secure Transportation (OST). Initial Appeal File, MSPB Docket No. DE-0752-09-0095-I-1 (IAF 0095-1), Tab 12 at 132-38. OST's mission involves "the safe secure movement of nuclear materials throughout the contiguous United States." *Id.* at 134. The appellant's duties included providing "immediate response to events involving Nuclear Material Courier (NMC) shipments." *Id.* The position requires certification under the agency's Human Reliability Program (HRP).[1] *See* 10 C.F.R. §§ 712.1, 712.10(a)(2); IAF 0095-1, Tab 12 at 114, 117.

¶3 The appellant alleged that, on August 4, 2007, his supervisors expressed their concern regarding mistakes that he made during his oral reading of the morning shift brief on July 29, 2007. IAF 0095-1, Tab 12 at 13. The agency subsequently sent the appellant for evaluation and HRP psychologists diagnosed him with a Mixed Receptive-Expressive Disorder that "impacts his ability to read, express himself accurately in writing and understand material that is presented in an auditory fashion." *Id.* at 19. The report recommended revocation of the appellant's HRP certification. *Id.* at 20. On August 26, 2008, the agency revoked the appellant's HRP certification under 10 C.F.R. § 712.13(c)(1) on the basis that the appellant had a psychological or physical disorder that impaired his

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[1] The HRP is a security and safety reliability program designed to ensure that individuals who occupy positions affording access to certain materials, nuclear explosive devices, facilities, and programs meet the highest standards of reliability and physical and mental suitability. 10 C.F.R. § 712.1; IAF 0095-1, Tab 12 at 114. After the parties submitted legal argument on the issue, the administrative judge determined that the Board's reviewing authority in the case of an employee's loss of HRP certification is not constrained by *Department of the Navy v. Egan*, 484 U.S. 518, 530-31 (1988). Neither party challenges that finding on review.

performance of his assigned duties. *Id.* at 17, 20. The appellant challenged the revocation of his certification.

¶4 On September 12, 2008, the agency proposed indefinitely suspending the appellant pending final resolution of his HRP certification. *Id.* at 27. The appellant subsequently requested a certification review hearing. *Id.* at 26. The appellant also responded to the proposed indefinite suspension and requested reassignment to non-HRP duties. *Id.* at 29-37. The agency issued an October 31, 2008 decision indefinitely suspending the appellant pending final resolution of his HRP certification. *Id.* at 98-99, 138. The appellant appealed his indefinite suspension. IAF 0095-1, Tab 1. On September 17, 2009, the agency issued a final decision on the appellant's certification review hearing, in which it determined that he "will not be recertified into an HRP position." Initial Appeal File, MSPB Docket No. DE-0752-09-0095-I-2 (IAF 0095-2), Tab 16 at 214.

¶5 On October 26, 2009, the agency proposed the appellant's removal for failure to maintain a condition of employment (HRP certification). Initial Appeal File, MSPB Docket No. DE-0752-10-0137-I-1 (IAF 0137), Tab 1 at 19. After the appellant made a written reply, the agency removed him effective December 6, 2009, for his failure to maintain a condition of employment. IAF 0137, Tab 4, Subtabs 4c, 4e. The appellant appealed both the removal and the indefinite suspension, and the administrative judge joined the appeals for adjudication. Initial Appeal File, MSPB Docket No. DE-0752-09-0095-I-3 (IAF 0095-3), Tabs 1-2; IAF 0137, Tab 14; *see* IAF 0095-1, Tab 19; IAF 0095-2, Tab 27.

¶6 On appeal, the appellant claimed that the agency committed disability discrimination when it failed to provide him with the reasonable accommodation of reassignment. IAF 0137, Tab 13 at 4-9. The appellant further claimed that the agency treated him differently from another employee who had lost his HRP certification. *Id.* at 9. He also claimed that the agency removed him in retaliation for filing equal employment opportunity (EEO) complaints and in reprisal for whistleblowing activity. *Id.* at 10-12. In the prehearing conference

summary, the administrative judge stated that the appellant withdrew his whistleblowing claim. IAF 0137, Tab 37 at 2.

¶7 After a hearing, the administrative judge sustained the actions and affirmed the appellant's removal. IAF 0137, Tab 45, Initial Decision (ID) at 2, 24. The administrative judge found that the agency properly implemented the appellant's indefinite suspension pending the agency's final decision on his HRP certification and subsequent notice of proposed removal. ID at 10-13. She further found that the agency established by preponderant evidence that maintaining HRP certification was a condition of the appellant's employment that he failed to maintain. ID at 13. The administrative judge rejected the appellant's affirmative defense of retaliation for protected EEO activity because he produced no evidence of a retaliatory intent on the part of any of the officials acting in this matter. ID at 13-15. As to the appellant's disability discrimination claim, the administrative judge found that the appellant established that he was disabled. ID at 18. However, the administrative judge further found that the appellant failed to establish that he was a qualified individual with a disability because he did not show that he was able to perform the essential functions of his Emergency Operations Specialist position with or without accommodation. ID at 20-21. Because the appellant failed to establish that he was a qualified individual with a disability, the administrative judge found that the agency was not obligated to provide him with a reasonable accommodation. ID at 21. The administrative judge also rejected the appellant's disparate penalty claim, found that the agency proved nexus, and determined that the penalty of removal was within tolerable bounds of reasonableness. ID at 21-24.

¶8 In his petition for review, the appellant asserts that the administrative judge erred by finding that the appellant was not a qualified individual with a disability. Petition for Review (PFR) File, Tab 1 at 7. Specifically, he argues that the administrative judge failed to analyze whether he was capable of performing the essential functions of other positions that were available, but instead based her

ruling on his admission that he was incapable of performing the essential functions of his position. *Id*. The appellant also challenges the administrative judge's findings regarding the penalties. *Id.* at 11-14. The agency responds in opposition. PFR File, Tab 3.

## ANALYSIS

The record is insufficient to determine whether the administrative judge properly sustained the indefinite suspension.

¶9 To sustain an indefinite suspension, the agency must show: (1) It imposed the suspension for an authorized reason, *see Gonzalez v. Department of Homeland Security*, 114 M.S.P.R. 318, ¶ 13 (2010); (2) the suspension has an ascertainable end, i.e., a determinable condition subsequent that will bring the suspension to a conclusion, *e.g.*, *Drain v. Department of Justice*, 108 M.S.P.R. 562, ¶ 8 (2008); *Arrieta v. Department of Homeland Security*, 108 M.S.P.R. 372, ¶ 8 (2008); *Albo v. U.S. Postal Service*, 104 M.S.P.R. 166, ¶ 7 (2006); (3) the suspension bears a nexus to the efficiency of the service, *Dunnington v. Department of Justice*, 956 F.2d 1151, 1156, 1158 (Fed. Cir. 1992); *Engdahl v. Department of the Navy*, 900 F.2d 1572, 1577-78 (Fed. Cir. 1990); *Harding v. Department of Veterans Affairs*, 115 M.S.P.R. 284, ¶ 21 (2010); and (4) the penalty is reasonable, *Dunnington*, 956 F.2d at 1154; *Harding*, 115 M.S.P.R. 284, ¶ 22.[2]

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[2] There are additional procedural requirements when an agency invokes the crime provision and provides a shortened reply period, and there are additional substantive requirements when an agency bases the suspension on criminal conduct, but those requirements are not applicable here. In addition, our reviewing court has also found that there are two different types of Board appeals that may arise from the imposition of an indefinite suspension. The first type, which is presented in this appeal, is an inquiry into the propriety of the agency's imposition of an indefinite suspension and looks only to facts relating to events prior to suspension that are proffered to support such an imposition. *See Rhodes v. Merit Systems Protection Board*, 487 F.3d 1377, 1380 (Fed. Cir. 2007). The second type of appeal, which has not been raised in this case, is one where an agency has failed to timely terminate an indefinite suspension and looks to facts and events that occur after the suspension was imposed. *Id.* Although an exact

¶10 In *Gonzalez*, the Board noted that it, and its reviewing court, have only approved the use of indefinite suspensions in three limited circumstances:

> 1. When the agency has reasonable cause to believe an employee has committed a crime for which a sentence of imprisonment could be imposed - pending the outcome of the criminal proceeding or any subsequent agency action following the conclusion of the criminal process.
>
> 2. When the agency has legitimate concerns that an employee's medical condition makes his continued presence in the workplace dangerous or inappropriate - pending a determination that the employee is fit for duty.
>
> 3. When an employee's access to classified information has been suspended and the employee must have such access to perform his job - pending a final determination on the employee's access to classified information.

*Gonzalez*, 114 M.S.P.R. 318, ¶ 13 (footnotes omitted). The first and third of those circumstances do not apply here. The action at issue in this appeal falls under the second circumstance and may be sustained pending a determination that the employee is fit for duty. *See Gonzalez*, 114 M.S.P.R. 318, ¶ 13; *see also* 5 C.F.R. § 752.402(e) (2009).[3] The administrative judge found that the agency's HRP certification review process was such a fitness determination and that the agency properly used indefinite suspension procedures under the circumstances of this case. ID at 12. She further found that the agency established a valid condition subsequent, i.e., the final resolution of the appellant's HRP

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duration for an indefinite suspension may not be ascertainable, a condition subsequent must exist that terminates the suspension. *See* 5 C.F.R. § 752.402; *see also* 5 U.S.C. § 7501(2). Once the condition subsequent has occurred, the agency must terminate the suspension within a reasonable amount of time. *See Engdahl*, 900 F.2d at 1578-79. The inquiry in such a case therefore looks to whether an identified condition subsequent has occurred after the suspension was imposed and whether the agency acted within a reasonable amount of time to terminate the suspension.

[3] The current version of this regulation omits the alphabetical designation before each definition; however, the pertinent text is unchanged. *Compare* 5 C.F.R. § 752.402(e) (2009) *with* 5 C.F.R. § 752.402 (2011).

certification, and that regulations promulgated by the Office of Personnel Management permitted the agency to continue the appellant's indefinite suspension during the notice period for the appellant's proposed removal. ID at 12-13; *see* 5 C.F.R. § 752.402(e) (2009); IAF 0095-1, Tab 12 at 27. The appellant does not challenge these findings on review and we see no reason to revisit them.

¶11 In addition to these requirements, the agency must also establish nexus and show that the penalty is reasonable. *E.g.*, *Harding*, 115 M.S.P.R. 284, ¶ 22. The administrative judge found it undisputed that HRP certification is a requirement of the Emergency Operations Specialist position, and further found that requirement provided a clear nexus with the efficiency of the service. ID at 6, 22. Again, we agree, and neither party challenges this finding on review. However, for the following reasons, we believe that the record is insufficient to establish whether the penalty of indefinite suspension is reasonable under the circumstances.

¶12 In order to establish that an indefinite suspension is reasonable, the agency must show that a lesser penalty, such as reassignment, would be ineffective under the circumstances. *Vega v. Department of Justice*, 37 M.S.P.R. 115, 118 (1988); *Martin v. Department of the Treasury, U.S. Customs Service*, 12 M.S.P.R. 12, 19 (1982), *aff'd in part, rev'd in part on other grounds sub nom. Brown v. Department of Justice*, 715 F.2d 662 (D.C. Cir. 1983), *and aff'd sub nom. Otherson v. Department of Justice*, 728 F.2d 1513 (D.C. Cir. 1984), *modified on other grounds by Barresi v. U.S. Postal Service*, 65 M.S.P.R. 656, 663 n.5 (1994). Further, pertinent agency policy provides that, "[i]f an organization has a vacant position that does not require access authorization, the Head of the Organization

may reassign the employee to the vacant position provided the employee otherwise meets the qualifications for the position." [4] IAF 0095-1, Tab 12 at 22.

¶13 The appellant identified at least one position for which he was allegedly qualified and that did not require HRP certification. *See* IAF 0137, Tab 41, Exhibit V. The appellant also identified other positions that, according to the agency's discovery response, were available in the New Mexico area in 2008, 2009, and 2010, and that had a status and compensation level equal to or below the level of the position from which the agency removed him, although it is not clear from the record whether any of these positions required HRP certification. *See* IAF 0137, Tab 41, Exhibits MM at 6, NN. Further, at the end of the hearing, the administrative judge read into the record the agency's response to the appellant's request for admissions in a related EEO case in which the agency conceded that it:

> [H]ad or continues to have positions similarly situated to [the appellant's] position available within the greater Albuquerque area between the time [the appellant] was removed from his former position until the date of this discovery request that did not or does not require the person to have an HRP certification or qualification.

Tr., March 31, 2010 at 127. The agency made a similar admission in the instant matter. *See* IAF 0137, Tab 41, Ex. MM at 15.

¶14 Because the record indicates that positions may have been available that did not require HRP certification and for which the appellant may have been qualified, we REMAND the appeal for evidence and argument on whether reassignment, rather than indefinite suspension, would have been effective under the circumstances of this case.

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[4] An agency employee relations specialist testified that the agency treats an employee's loss of HRP certification the same as it treats an employee's loss of a security clearance. Hearing Transcript (Tr.), March 30, 2010 at 114.

The appellant was entitled to be considered for reassignment as a reasonable accommodation.

¶15 The appellant also argues in his petition for review that the administrative judge incorrectly found that he was not entitled to reasonable accommodation because she based her decision entirely on whether he could perform the essential duties of the position from which he was removed. PFR File, Tab 1 at 7. Although the administrative judge correctly noted that reasonable accommodation may include reassignment to a vacant position, her discussion of whether the appellant was a qualified individual with a disability omitted any discussion of the appellant's qualifications for any positions other than the one from which the agency removed him. *See* ID at 19-21.

¶16 The appellant was entitled to be considered for reassignment to a vacant position for which he was otherwise qualified as a form of reasonable accommodation. *See* 42 U.S.C. § 12111(9); *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1301-05 (D.C. Cir. 1998) (en banc); *Gonzalez-Acosta v. Department of Veterans Affairs*, 113 M.S.P.R. 277, ¶ 14 (2010); 29 C.F.R. § 1630.2(o)(ii).[5] Enforcement guidance issued by the EEOC instructs in pertinent

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[5] As a federal employee, the appellant's claim arises under the Rehabilitation Act of 1973, but the regulatory standards for the Americans with Disabilities Act (ADA) have been incorporated by reference into the Rehabilitation Act and are applied to determine whether there has been a Rehabilitation Act violation. 29 U.S.C. § 791(g); *Pinegar v. Federal Election Commission*, 105 M.S.P.R. 677, ¶ 36 n.3 (2007); 29 C.F.R. § 1614.203(b). Further, the Equal Employment Opportunity Commission's (EEOC) regulations under the Rehabilitation Act were superseded by the ADA regulations. *Collins v. U.S. Postal Service*, 100 M.S.P.R. 332, ¶¶ 7-8 (2005) (stating that 29 C.F.R. § 1614.203(g) and other portions of the regulations at 29 C.F.R. § 1614.203 were repealed on June 20, 2002, and the ADA regulations at 29 C.F.R. part 1630 were made applicable to cases under the Rehabilitation Act); 29 C.F.R. § 1614.203(b). We recognize that the ADA Amendments Act of 2008 (ADAAA) became effective on January 1, 2009, and that the EEOC subsequently issued amended regulations and guidance concerning it. *See Southerland v. Department of Defense*, 2011 MSPB 92, ¶ 25. The ADAAA, however, did not change the statutory provision regarding reasonable accommodation. *Id.*, ¶ 33 n.9; *Gonzalez-Acosta*, 113 M.S.P.R. 277, ¶ 11. Thus, to the extent that the ADAAA applies to the adverse actions at issue here, the ADAAA and its implementing regulations do not affect the outcome of this case.

part that reassignment to a vacant position is a form of reasonable accommodation that "must be provided to an employee who, because of a disability, can no longer perform the essential functions of his/her current position, with or without reasonable accommodation, unless the employer can show that it would be an undue hardship." *EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Reassignment*, available at www.eeoc.gov/policy/docs/accommodation.html. An appropriate position would be one for which the appellant was qualified by skill, experience, and education and which was equivalent in terms of pay, status, and other relevant factors. 29 C.F.R. part 1630 Appendix, § 1630.2(o); *EEOC Enforcement Guidance, Reassignment*.

¶17 As discussed above, the record reflects that the agency may have had appropriate positions to which it could have reassigned the appellant as a reasonable accommodation, but the agency failed to engage in the interactive process to find the appellant such an accommodation. Once an appellant has requested accommodation, the employer must engage in an interactive process to determine an appropriate accommodation. *Gonzalez-Acosta*, 113 M.S.P.R. 277, ¶ 15. The appellant requested reassignment to a non-HRP position as a reasonable accommodation, and despite the fact that positions were allegedly available for his reassignment, neither his supervisor nor the Human Resources employee assigned to the appellant's case made any attempt to find him one. PFR File, Tab 1 at 4; *see* IAF 0137, Tab 28 at 9-10, Tab 43 at 13-14. Those individuals' testimony that they did not believe they had the authority to reassign the appellant, and that they did not refer the matter to someone who had such authority, supports the appellant's allegation. *See* Tr., March 29, 2010 at 190; Tr., March 30, 2010 at 125-28. Thus, the record reflects that the agency failed to engage in the interactive process in order to identify a reasonable accommodation.

¶18 The failure to engage in the interactive process alone does not violate the Rehabilitation Act; rather the appellant must show that this omission resulted in failure to provide reasonable accommodation. *Gonzalez-Acosta*, 113 M.S.P.R. 277, ¶ 16. Although the appellant in *Gonzalez-Acosta* failed to make such a showing, the above discussion regarding the availability of non-HRP positions indicates that the instant appellant may have done so. Further, the ADA contains no language limiting the agency's obligation to reassign only to positions within a particular office or branch of the agency. *E.g.*, *Chen v. U.S. Postal Service*, 114 M.S.P.R. 292, ¶ 17 (2010); 29 C.F.R. § 1630.2(o)(2)(ii). "Rather, the extent to which an employer must search for a vacant position will be an issue of undue hardship." *EEOC Enforcement Guidance* at Q. 27; *see also EEOC Questions and Answers: Promoting Employment of Individuals with Disabilities in the Federal Workforce* (2008) at Q. 24, available at http://www.eeoc.gov/federal/qanda-employment-with-disabilities.cfm ("Reassignment is not limited to the facility, commuting area, sub-component, . . . or type of work to which the individual with a disability is assigned at the time the need for accommodation arises.").

¶19 Because the administrative judge did not make any findings on this issue, and resolving the conflicting evidence could require credibility determinations, we REMAND the appeal for evidence, argument, and further adjudication on this issue. *See, e.g.*, *Carmack v. U.S. Postal Service*, 98 M.S.P.R. 128, ¶ 10 (2005) (appeal remanded for further findings on whether work existed within the appellant's medical restrictions).

ORDER

¶20 Accordingly, we REMAND both appeals to the Denver Field Office for further adjudication in accordance with this remand order.

FOR THE BOARD:

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