

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

2009 MSPB 152

Docket No. SL-0353-93-0390-X-2

**Ralph R. Heidel,
Appellant,**

v.

**United States Postal Service,
Agency.**

August 5, 2009

Stephen T. Hyder, Maryville, Tennessee, for the appellant.

Jennifer C. Kellett, Esquire, Memphis, Tennessee, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 This case is before the Board based on a recommendation of an administrative judge which found the agency in noncompliance with a final decision of the Merit Systems Protection Board (MSPB). For the reasons set forth below, we find that the agency is now in compliance with the final decision and DISMISS the petition for enforcement as MOOT.

BACKGROUND

¶2 This matter originated in the 1990s, and there have been two prior Board decisions involving the appellant and the agency. *See Heidel v. U.S. Postal Service*, [69 M.S.P.R. 511](#) (1996); *Heidel v. U.S. Postal Service*, [63](#)

[M.S.P.R. 669](#) (1994). The essential facts are that the appellant occupied a mail handler position with the agency in Knoxville, Tennessee, when he was called to active military service in the United States Army Reserve. *See Heidel*, 63 M.S.P.R. at 671. Upon his discharge from the military for “physical disability,” the appellant sought restoration with the Postal Service and, thereafter, filed an appeal with the MSPB claiming that the agency had not properly restored him when it offered him a custodian position at a lower grade than he previously held. *Id.* at 671-72. After additional proceedings, the Board issued a decision which stated, among other things, as follows:

We ORDER the agency to offer the appellant an equivalent position at the Knoxville facility or a facility within the Knoxville commuting area, or, if such a position is not available, a position within the agency for which he is qualified that will provide him with either the same seniority, status, and pay of his former Mail Handler position or any other position within the agency for which he is qualified that most closely approximates the seniority, status, and pay to which he would otherwise be entitled, consistent with the circumstances in his case.

Id. at 677. The Board reiterated essentially the same requirements in an opinion and order in a subsequent compliance proceeding. *Heidel*, 69 M.S.P.R. at 521.

¶3 Thereafter, in a March 18, 1998 letter, the agency assigned the appellant a level 5 Clerk position with a 6:00 a.m. to 2:30 p.m. tour of duty, Saturdays and Sundays off, and specific medical restrictions. MSPB Docket No. SL-0353-93-0390-C-2, Compliance File (CF), Tab 2 at 5. The appellant signed the assignment letter indicating that he concurred with the agency’s assignment in response to the Board’s decision. CF, Tab 2 at 5.

¶4 The arrangement set forth in the March 18, 1998 letter was apparently satisfactory until November 21, 2008, when the agency informed the appellant of some changes in his working conditions. *See* CF, Tab 1 at 5-6. The appellant then filed the instant compliance matter with the MSPB’s Atlanta Regional Office

and alleged that the agency was in breach of a settlement agreement regarding his tour of duty and medical restrictions. *Id.*, Tab 1.

¶5 After affording the parties the opportunity to file evidence and argument regarding compliance, the administrative judge first found that the March 18, 1998 letter from the agency and concurred in by the appellant did not constitute a settlement agreement enforceable before the MSPB. CF, Tab 19 at 4. The administrative judge also found, however, that while the agency had a bona fide business reason for changing the appellant's tour of duty, the agency failed to establish that it remained in compliance with the Board's previous opinions and orders to assign the appellant to a position "for which he is qualified." *Id.* at 4-7. Because the administrative judge recommended that the Board find the agency in noncompliance, this matter was referred to the Board.

ANALYSIS

¶6 Neither party to this compliance proceeding has contested the administrative judge's finding that the March 18, 1998 letter did not constitute an enforceable settlement agreement. *See id.* at 4. Nor has the appellant contested the administrative judge's finding that the agency had a bona fide business reason for changing his tour of duty. *See id.* at 5. Thus, the sole issue presented by this compliance case is the administrative judge's recommendation that to be in compliance, the agency must assign the appellant to a position "for which he is qualified." *Id.* at 7.

¶7 It is the agency's burden to prove that it has complied with the Board's final decision, and the agency's contentions of compliance must be supported by relevant, material, and credible evidence in the form of documentation or affidavits. *See New v. Department of Veterans Affairs*, [106 M.S.P.R. 217](#), ¶ 6 (2007), *aff'd*, 293 F. App'x 779 (Fed. Cir. 2008); *Donovan v. U.S. Postal Service*, [101 M.S.P.R. 628](#), ¶¶ 6-7 (2006), *review dismissed*, 213 F. App'x 978 (Fed. Cir. 2006); *Brownlow v. Department of the Treasury*, [89 M.S.P.R. 223](#), ¶ 7 (2001).

The appellant may rebut the agency's evidence of compliance by making specific, nonconclusory, and supported assertions on continued noncompliance. *See New*, [106 M.S.P.R. 217](#), ¶ 6; *Donovan*, 101 M.S.P.R. 628, ¶ 7.

¶8 In response to the administrative judge's recommendation, the agency provided an April 9, 2009 letter to the appellant from his supervisor setting forth the appellant's medical restrictions in his level 6 clerk position. MSPB Docket No. SL-0353-93-0390-X-2, Compliance Referral File (CRF), Tab 3 at 2. Those restrictions are as follows:

No lifting greater than 40-50 pounds maximum
No lifting greater than 20 pounds on a frequent basis
Decrease amount of stooping, standing, and bending
Stand/walk 2 to 4 hours at a time
Shift from sit to stand or stand to sit 8 times a day

Id. In his letter, the appellant's supervisor articulated specific tasks that the appellant was not to perform, directed that the appellant was not to violate the medical restrictions under any circumstances, and stated that if a task exceeded the appellant's restrictions he was to ask for help. *Id.*

¶9 The appellant has responded that it was improper for the agency to assign him the responsibility not to violate his medical restrictions because the agency was ordered to place him in a position for which he was qualified and he is not able to determine whether a task violates his restrictions because he is not a medical expert. CRF, Tab 6 at 3-4. The appellant also complained that it is not possible for him to comply with his medical restrictions and complete the duties of his assigned position. *Id.* at 5.

¶10 While the instant case does not involve allegations of disability discrimination, the circumstances are analogous to the cases involving reasonable accommodation for a disability under the Americans with Disabilities Act.¹ In

¹ Neither party has cited any Board, Federal Circuit, or other precedent to support its position.

that context, the Board has held that an employee is not entitled to reassignment to the position of the employee's choice, but is only entitled to a reasonable accommodation. *Henry v. Department of Veterans Affairs*, [108 M.S.P.R. 458](#), ¶ 22 (2008); *McConnell v. Department of the Army*, [61 M.S.P.R. 163](#), 170 (1994). Here, although the appellant may desire an assignment to a particular position, to be in compliance with the Board's final order, the agency need only assign the appellant to a position for which he is qualified. *See* CF, Tab 19 at 7. The agency has restructured the appellant's current position by instructing him not to perform the duties normally associated with the position that exceed his medical restrictions. CRF, Tab 3 at 2. Thus, the appellant has been assigned duties that are within his medical restrictions and, therefore, a position for which he is qualified.²

¶11 Regarding the appellant's contention that performing the duties of his assigned position requires him to exceed his medical restrictions, in the context of reasonable accommodation law, the Equal Employment Opportunity Commission (EEOC) has held that "once an employer accommodates an employee's limitations, the employee has the obligation to work safely within the accommodation provided by the agency and to work within her own limitations." *Mercado v. U.S. Postal Service*, EEOC Appeal No. 01941218, slip op. at 2 (Oct. 3, 1994); *Richardson v. U.S. Postal Service*, EEOC Appeal No. 01912009, slip op. at 10 (Aug. 29, 1991). In the *Mercado* case, for example, the Commission found that the Postal Service had not failed to accommodate a postal clerk, who had been accommodated by being assigned to light-duty work within her medical

² In a June 22, 2009 submission, the appellant explained that he had been temporarily assigned to a position which he described as essentially the same as the position he was transferred from on November 21, 2008. CRF, Tab 8 at 1. It is not clear from the record whether this position may become permanent. Because the appointment identified by the appellant is apparently only temporary, this opinion and order addresses the propriety of the agency November 21, 2008 assignment of the appellant, as modified by the April 9, 2009 letter from the appellant's supervisor.

restrictions, when the employee injured herself further while retrieving a package in excess of her medical restrictions and her supervisor's instructions. *Mercado*, EEOC Appeal No. 1941218, slip op. at 1-2. Similarly, in the *Richardson* decision, the Commission found that the Postal Service had reasonably accommodated a mail handler by modifying the duties of her position and the fact that the employee exceeded her restrictions and injured herself by improperly operating a piece of machinery did not establish that the agency failed to reasonably accommodate the employee. *Id.* at 9. Consistent with the EEOC's reasoning, we conclude that, because the agency has assigned the appellant to a position for which he is qualified, if the appellant exceeds his medical restrictions -- and the instructions of his supervisor not to exceed those medical restrictions -- the agency has not failed in its assignment obligations.

¶12 Finally, we are not persuaded by the appellant's contention that he is not able to determine whether a task violates his restrictions because he is not a medical expert. The appellant's medical restrictions, which are set forth above, are such that they do not require medical expertise to understand. In fact, because the restrictions are not specific and definite but rather, call for the appellant to avoid certain acts "on a frequent basis," and to "decrease" other activities, in our view, there is no one better able than the appellant to understand whether a particular task on a particular day is within his restrictions.

ORDER

¶13 Because the agency has assigned the appellant to a position "for which he is qualified," the agency has complied with the Board's final decision. Accordingly, the petition for enforcement is moot. This is the final decision of the Merit Systems Protection Board in this compliance matter. Title 5 of the Code of Federal Regulations, section 1201.183(b).

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. 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:

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