

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

2013 MSPB 27

Docket No. SF-0752-11-0766-I-1

Mary A. Miller,

Appellant,

v.

Department of the Interior,

Agency.

April 3, 2013

Edward H. Passman, Esquire, Washington, D.C., for the appellant.

Chandra R. Postma, Esquire, Anchorage, Alaska, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that affirmed her removal for failure to accept a management directed reassignment. For the following reasons, we VACATE the initial decision and REVERSE the appellant's removal.¹

¹ Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

BACKGROUND

¶2 The appellant was a Superintendent at the Sitka National Historical Park in Alaska prior to her removal effective August 6, 2010, based on a charge of “failure to accept a management directed reassignment” to the “newly created” position of Alaska Native Affairs Liaison (Liaison position) in Anchorage, Alaska. Initial Appeal File (IAF), Tab 1 at 4, 7; Tab 3, Subtabs 4e, 4h, 4m. She appealed her removal, asserting that she did not meet the minimum qualifications for the Liaison position and that her removal was “tainted by discrimination” based on her race, sex, and physical disability. IAF, Tab 1 at 5. She also alleged that the action was taken in reprisal for protected equal employment opportunity (EEO) activity. *Id.* She further asserted that the agency committed harmful procedural error in taking the removal action, that the penalty was unduly harsh, and that her removal did not promote the efficiency of the service. *Id.*

¶3 The administrative judge found that the agency proved by preponderant evidence that its decision to reassign the appellant was based upon legitimate management reasons, that it gave adequate notice to the appellant, and that the appellant refused the reassignment. IAF, Tab 16, Initial Decision (ID) at 6, 19-20. The administrative judge found that there was no dispute that the appellant declined the management directed reassignment. ID at 20. The administrative judge further found that the appellant was qualified to perform the duties of the new position. ID at 20-21. The administrative judge found that the appellant failed to meet her burden of proof on each of her affirmative defenses and that the penalty was reasonable and promoted the efficiency of the service. ID at 22-30.

¶4 The appellant has filed a petition for review,² and the agency has filed a substantive opposition. Petition for Review File, Tabs 1, 4. For the following

² The appellant makes two main arguments on review: (1) that the agency lacked legitimate management reasons for creating the Liaison position; and (2) that the administrative judge erred in finding that the appellant was qualified for the position.

reasons, we REVERSE the appellant's removal and ORDER the agency to reinstate the appellant to her position as the Superintendent at the Sitka National Historical Park.

ANALYSIS

¶5 We are departing from the existing three-step analytical framework for deciding adverse actions based on a refusal to accept a directed reassignment in favor of a single efficiency of the service criterion. The framework for evaluating adverse actions based on a refusal to accept a directed reassignment was set forth in *Ketterer v. Department of Agriculture*, [2 M.S.P.R. 294](#) (1980), and *Umshler v. Department of the Interior*, [44 M.S.P.R. 628](#) (1990). Under the old framework, when an adverse action under 5 U.S.C. chapter 75 was premised on an employee's refusal to accept a directed assignment, the agency was obligated to prove by preponderant evidence that the removal would promote the efficiency of the service. *Ketterer*, 2 M.S.P.R. at 298; see [5 U.S.C. §§ 7511](#), 7512, 7513(a). This necessarily included a demonstration that the agency's decision was a bona fide determination based on legitimate management considerations in the interests of the service. *Ketterer*, 2 M.S.P.R. at 298. Together with evidence that the employee had adequate notice of the decision to transfer and that she refused to accept the reassignment, this ordinarily would have been sufficient to establish a prima facie case. *Id.* at 299. Once the agency made out a prima facie case under the old framework, the burden of going forward with rebuttal evidence then shifted to the appellant. *Umshler*, 44 M.S.P.R. at 630. If the appellant could show that the reassignment had no solid or substantial basis in personnel practice or principle, the Board may have then concluded that the reassignment was not a

Petition for Review File, Tab 1. In light of our disposition of the case, we need not address these arguments. Further, we discern no error in the administrative judge's findings, which the appellant does not challenge on review, that the appellant failed to prove her affirmative defenses of discrimination, retaliation, and harmful procedural error.

valid exercise of managerial discretion, but was instead either an improper effort to pressure the appellant to resign or was at least an arbitrary and capricious action. *Id.* If the appellant successfully rebutted the agency's prima facie case, the third step would have been for the agency to come forward with further evidence relating the reassignment to the efficiency of the service. *Ketterer*, 2 M.S.P.R. at 300; *see also Frey v. Department of Labor*, [359 F.3d 1355](#), 1360 (Fed. Cir. 2004) (endorsing the Board's framework and adopting it as the law of the circuit).

¶6 We revisit the analytical framework of a prima facie case and shifting burdens of production described above and reject it in favor of a single efficiency of the service criterion for evaluating adverse actions based on a refusal to accept a directed reassignment. In rejecting a three-step framework in favor of a single criterion, we draw upon the three-step framework that exists in employment discrimination and retaliation claims under *McDonnell Douglas Corp. v. Green*, [411 U.S. 792](#), 802-04 (1973). When addressing claims of unlawful employment discrimination and retaliation, the Board has eschewed the three-step framework when the record has been fully developed. This is because, once the record is complete, it is irrelevant whether a prima facie case was established; instead, the Board weighs all the evidence and makes a finding on the ultimate issue of whether the agency action was discriminatory or retaliatory in nature.³ *See Godesky v. Department of Health & Human Services*, [101 M.S.P.R. 280](#), ¶ 10 (2006); *Simien v. U.S. Postal Service*, [99 M.S.P.R. 237](#), ¶¶ 26-28 (2005).

³ The three-step framework of *Ketterer* and *Umsler* in adverse action appeals based on a refusal to accept a directed reassignment is the converse of the three-step framework in discrimination and retaliation cases in that, in the former, the agency employer has the burden on the first and third steps, and, in the latter, the employee complainant has the burden in the first and third steps. *See Wingate v. U.S. Postal Service*, [118 M.S.P.R. 566](#), ¶ 4 (2012) (articulating the *McDonnell Douglas* burden-shifting analysis). Otherwise, however, the process is similar.

¶7 Similarly, in adverse action cases based on a refusal to accept a directed reassignment, the Board shall weigh all of the evidence and make a finding on the ultimate issue of whether the action promotes the efficiency of the service. The agency must do more than merely establish a “rational basis” for the reassignment. *Else v. Department of Justice*, [3 M.S.P.R. 397](#), 399 (1980). The agency must establish by a preponderance of the evidence that the reassignment was properly ordered due to bona fide management considerations in the interest of promoting the efficiency of the service and in accordance with agency discretion under 5 C.F.R. part 335. *Ketterer*, 2 M.S.P.R. at 298 & n.8; *see also McClelland v. Andrus*, [606 F.2d 1278](#), 1290-91 (D.C. Cir. 1979) (“An action supportable on ‘any rational basis’ is not necessarily one that will promote the efficiency of the service.”). Although we are discarding the three-step framework that includes a prima facie case in favor of single efficiency of the service criterion, we are not changing existing case law in any other way, and the factors relevant to the former three-step framework remain relevant to evaluating the case as a whole.

¶8 In most appeals involving management directed reassignments, the agency has rebutted the appellant’s response to its prima facie case by showing that the reassignment was required because it had eliminated or had no need for the appellant’s continued performance in her former position or because it needed to address the appellant’s performance problems in her former position. *See, e.g., Frey*, 359 F.3d at 1358, 1360 (the reassignment was proper to address recent mine fires and accidents because the appellant was not the best suited to address the issues in his field office and he would face less complicated enforcement problems in a different office); *Cooke v. U.S. Postal Service*, [67 M.S.P.R. 401](#), 406 (finding the reassignment proper because it was due to a nationwide restructuring), *aff’d*, 73 F.3d 380 (Fed. Cir. 1995) (Table); *Wear v. Department of Agriculture*, [22 M.S.P.R. 597](#), 599 (1984) (holding that the reasons justifying a reduction-in-force, such as cutbacks in the appellant’s region, were also a

legitimate reason for a reassignment); *O'Connor v. Department of the Interior*, [21 M.S.P.R. 687](#), 689-90 (1984) (finding that the reassignment was legitimate because the agency had undergone a nationwide reorganization).

¶9 Such considerations, which are relevant to the single efficiency of the service criterion without regard to where they would have fit into the former three-step analysis, are absent here. Applying the efficiency of the service criterion articulated above, we find that the agency did not prove by preponderant evidence that the appellant's removal promoted the efficiency of the service. The appellant transferred to the agency on March 16, 2008, as the Superintendent for the Sitka National Historical Park in Sitka, Alaska. IAF, Tab 3, Subtab 4x. The record and testimony of agency witnesses indicate that the appellant was successful in her position. IAF, Tab 3, Subtab 4v; Hearing Transcript Volume I (HT) at 18-21, 43-45, 53-59 (testimony of Victor Knox, the Deputy Regional Director and the appellant's first-line supervisor), 83-84, 91, 93-95, 102-03, 113-18 (testimony of Sue Masica, the Regional Director and the appellant's second-line supervisor). According to the agency, it determined that it had a need for a Liaison position based in Anchorage, Alaska, and that the appellant was well-suited for the position. HT at 10-12, 18-20 (testimony of Mr. Knox). On April 27, 2010, Mr. Knox offered the appellant a voluntary reassignment to the position. IAF, Tab 3, Subtab 4t. When the appellant declined the offered position due to geographic and other hardships, Mr. Knox presented her with a memorandum directing her reassignment to the position and stating that, if she declined the position, removal procedures would commence against her. *Id.*, Subtab 4s. The appellant declined the position, and the agency effected her removal on August 6, 2010, for failure to accept a management directed reassignment to the Liaison position in Anchorage, Alaska. *Id.*, Subtabs 4e, 4h, 4m, 4n. After the appellant's removal, the agency filled both the Superintendent and Liaison position vacancies. HT at 41-42, 45-46 (testimony of Mr. Knox).

¶10 According to the agency, it had a high regard for the appellant's performance as the Superintendent in Sitka. Indeed, agency witnesses testified that the agency relied upon the appellant's strengths and accomplishments as a Superintendent as the basis for directing her reassignment to the Liaison position in Anchorage, over 500 miles away. HT at 18-21, 43-45, 53-59, 68-72 (testimony of Mr. Knox), 83-84, 91, 93-95, 102-03, 113-18 (testimony of Ms. Masica), 177-78 (testimony of Helen Stewart, a Supervisory Human Resource Specialist). Accepting as true that testimony, along with the agency's representations that it had an independent and legitimate management reason both for creating the Liaison position and for locating it in Anchorage, more than 500 miles from Sitka, we find that it did not promote the efficiency of the service to direct the appellant to take the position in Anchorage against her will and to remove her from employment altogether when she declined the position. As a result of the agency's actions, it lost an apparently valued and successful employee, and created two vacancies that the agency had to fill after her removal. Accordingly, the appellant's removal is reversed.

ORDER

¶11 We ORDER the agency to CANCEL the appellant's removal and REINSTATE her as the Superintendent of the Sitka National Historical Park retroactive to August 6, 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 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, D.C. 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, D.C. 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 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 the date of this order. See [5 U.S.C. § 7703\(b\)\(1\)\(A\)](#) (as rev. eff. Dec. 27, 2012). 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](#)) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. 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.



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.