

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
2013 MSPB 35**

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

**Mary A. Miller,
Appellant,**

v.

**Department of the Interior,
Agency.**

May 13, 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 Upon further consideration, we hereby REOPEN this case pursuant to [5 C.F.R. § 1201.118](#), VACATE our April 3, 2013 Opinion and Order in this case, and SUBSTITUTE the following decision.

¶2 The appellant has filed a petition for review of the initial decision that affirmed her removal for failure to accept a management directed geographic

reassignment. For the following reasons, we VACATE the initial decision and REVERSE the appellant's removal.¹

BACKGROUND

¶3 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 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.*

¶4 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

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.

and that the penalty was reasonable and promoted the efficiency of the service. ID at 22-30.

¶5 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 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

¶6 In *Ketterer v. Department of Agriculture*, [2 M.S.P.R. 294](#), 298 (1980), the Board adopted a framework of shifting burdens of proof to analyze an adverse action under 5 U.S.C. chapter 75 premised on an employee's refusal to accept a geographic reassignment. Under this framework, the agency had the initial burden of showing that its decision to reassign the employee was based on legitimate management considerations in the interest of the service. *Ketterer*, 2 M.S.P.R. at 299. Such a showing, along with evidence that the employee had adequate notice of the decision to transfer and refused to accept the reassignment, was sufficient to establish a prima facie case. *Id.* Once the agency made out a prima facie case, the burden shifted to the appellant to produce rebuttal evidence to demonstrate that the reassignment had no solid or substantial basis in personnel practice or principle. See *Umshler v. Department of the Interior*, [44 M.S.P.R. 628](#), 630 (1990). Absent preponderant evidence relating the reassignment to the efficiency of the service, the Board could conclude that the

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. 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.

reassignment was not a 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.*; *Ketterer*, 2 M.S.P.R. at 300; *see 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).

¶7 Upon careful consideration, we have concluded that the burden-shifting apparatus outlined in *Ketterer* does not meaningfully add to the Board’s adjudication of an adverse action based on a refusal to accept a directed geographic reassignment. In all chapter 75 adverse action appeals, the agency must prove by a preponderance of the evidence both that the underlying misconduct occurred and that the action promotes the efficiency of the service. [5 U.S.C. § 7513](#)(a). Where, as here, the record is complete, determining whether the agency met a prima facie case is irrelevant. *Cf. Wingate v. U.S. Postal Service*, [118 M.S.P.R. 566](#), ¶ 4 (2012) (eschewing the *McDonnell Douglas* burden-shifting analysis in an age discrimination case where the record is complete); *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). Instead, the Board should simply weigh all the evidence and make a finding on the ultimate issue of whether the agency proved by a preponderance of the evidence that the misconduct occurred and that its action promotes the efficiency of the service.

¶8 In abandoning the cumbersome and unnecessary burden-shifting approach, we in no way depart from any of the jurisprudential principles otherwise governing our review of an adverse action based on a refusal to accept a geographic reassignment. For example, we have long held, and today reaffirm, that an 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 geographic 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 *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.”). This may be done by showing that the reassignment was required because the agency 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 Here, the record evidence simply does not support a finding that the agency directed the appellant’s geographic reassignment due to bona fide management considerations and that her ensuing 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 Although the agency presented evidence to show that it had a legitimate reason to create the Alaska Native Affairs Liaison position, it failed to provide a "rational basis" for requiring the appellant to accept a geographic reassignment into the position. For example, the agency made no showing that the appellant's reassignment was necessary because the Superintendent position had been eliminated or the agency had no need for her continued performance in that position. *Cf. Frey*, 359 F.3d at 1358, 1360. Nor is there any indication that the agency needed to reassign her because of any performance problems in the Superintendent position. *Id.* at 1358. In the same vein, the agency did not proffer any evidence suggesting that the appellant's reassignment to Anchorage was necessary because of a reduction-in-force or reorganization. *Cf. Wear*, 22 M.S.P.R. at 599. In sum, the agency failed to present any evidence showing that its reasons for directing the appellant's geographic reassignment to Anchorage were bona fide such as to support a finding that her removal for refusing to take the reassignment promoted the efficiency of the service. Furthermore, the

appellant has submitted sufficient credible evidence to cast doubt on the agency's motivations in effecting her removal. The record shows that the appellant was not serving in a position with a mobility requirement. IAF, Tab 4, Subtab 4y. She also has shown that her declination of the Liaison position did not impair the performance of that position's functions. Indeed, besides offering to perform the position's functions while she performed her duties as Superintendent at Sitka, the appellant also offered evidence that the agency had no trouble filling the position—it received 120 applications—and ultimately filled the position with a Native Alaskan attorney with experience in tribal liaison work. HT at 42 (testimony of Mr. Knox), 111-12 (testimony of Ms. Masica). Under these circumstances, where the agency has failed to provide any evidence that the appellant's geographic reassignment was necessary and where the ensuing removal action does not appear to be rationally related to the efficiency of the service, we find—consistent with our longstanding precedent—that the agency invoked its discretion to reassign the appellant “as a veil to effect” her separation. *See Ketterer*, 2 M.S.P.R. at 299 n.8.

¶11 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

¶12 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.

¶13 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, 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.

¶14 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).

¶15 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\(a\)](#).

¶16 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.

¶17 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 review of this final decision on your discrimination claims by the Equal Employment Opportunity Commission (EEOC). *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 review of this final decision on the other issues in your appeal by the United States Court of Appeals for the Federal Circuit. 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.