UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 80

Docket No. CH-0752-12-0362-I-3

Deborah K. Massey,

Appellant,

v.

Department of the Army,

Agency.

October 25, 2013

Brian Henson, Esquire, Decatur, Georgia, for the appellant.

Chasity C. Nicoll, Esquire, and Gary F. Baumann, Fort Campbell, Kentucky, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision affirming the agency's removal action and finding that she failed to prove her affirmative defense of disability discrimination. For the reasons set forth below, we GRANT the appellant's petition and VACATE the initial decision IN PART. We REVERSE the agency's removal action and AFFIRM the administrative judge's finding that the agency did not discriminate against the appellant based on disability.

BACKGROUND

¶2 The appellant was a Nurse (Clinical/Medical-Surgical), GS-0610-10, at the agency's Blanchfield Army Community Hospital (BACH) in Fort Campbell, Kentucky. Initial Appeal File (IAF) (I-1), Tab 5 at 12. She was removed for medical inability to perform the duties of her position. *Id.* She had been employed with the agency for over 21 years, *id.* at 23, but in November 2011, submitted medical documentation stating that she suffered from a chronic respiratory disorder triggered by the phenols found in the cleaning solutions and solvents used in the hospital. *Id.* at 38-39. She agreed to a fitness for duty examination, and the examiner concluded that she would be unable to meet the physical requirements of her position unless the agency could eliminate her exposure to those chemicals and to other fumes and fragrances. *Id.* at 35-36, 40-41. The agency subsequently removed her for medical inability to perform the duties of her position.[*] *Id.* at 22-26.

¶3 On appeal, the appellant did not dispute that she was unable to perform the essential functions of her position. IAF (I-3), Tab 9 at 3. She asserted, however, that the agency should have tried harder to find her a position at a facility not subject to such stringent sanitation requirements, and therefore it discriminated against her based on disability. IAF (I-3), Tabs 12 at 7-8. The appellant also asserted that the agency violated her right to due process when it did not allow her to respond orally to the notice proposal. IAF (I-1), Tab 1 at 5-6; IAF (I-3), Tab 9 at 2-3. The administrative judge adjudicated the appeal based on the written record and sustained the charge, finding that the agency did not discriminate against the appellant. IAF (I-3), Tab 13, Initial Decision (ID) at 1-4, 6-9. She rejected the appellant's due process argument. ID at 4-6. On review,

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[*] We note here that the appellant filed an application for disability retirement. The Office of Personnel Management denied her application, and she stated her intention to appeal that decision. IAF (I-3), Tab 9 at 3.

the appellant's argument pertains solely to the administrative judge's findings on the due process issue. *See* Petition for Review (PFR) File, Tab 1.

ANALYSIS

¶4 When an agency takes an adverse action against an employee pursuant to chapter 75, the employee against whom the action is proposed is entitled to "(1) at least 30 days' advance written notice . . . stating the specific reasons for the proposed action; (2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer; (3) be represented by an attorney or other representative; and (4) a written decision and the specific reasons therefor at the earliest practicable date." 5 U.S.C. § 7513(b). These statutory provisions are consistent with the extension of the Fifth Amendment Due Process Clause to an individual's loss of government employment in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). In *Loudermill*, the Supreme Court explained that "the root requirement" of due process is for the employee to receive "an opportunity for a hearing *before* he is deprived of any significant property interest." *Id.* at 542 (emphasis in original). This requires an agency to offer the employee a "meaningful opportunity to invoke the discretion of the decision maker" before the agency effects the personnel action. *Id.* at 543. Minimum due process requires that the employee have oral or written notice of the charges against her, an explanation of the employer's evidence, and "the opportunity to present reasons, either in person or in writing, why proposed action should not be taken." *Id.* at 546.

¶5 Here, the agency proposed the appellant's removal on January 10, 2012. IAF (I-1), Tab 5 at 43-45. The agency gave her 14 days in which to respond. *Id.* at 44. The appellant, who was represented by her union, sought and received a 14-day extension ending February 7, 2012. *Id.* at 47; *see id.* at 53-54. The human resources specialist assisting the deciding official notified the union

representative, instructing him to "[please ensure you are on [the deciding official's] calendar NLT COB on 7Feb12." *Id.* at 47; *see id.* at 56. On February 3, 2012, the appellant informed the deciding official that she would be represented by a private attorney, Lance Miller, Esq. *Id.* at 49. On February 7, 2012, Miller emailed the deciding official. *Id.* at 50-51. He asked for a member of the deciding official's staff to contact him to schedule an oral reply. *Id.* The deciding official did not do so, and instead, on February 21, 2012, issued a decision sustaining the charge and removing the appellant. *Id.* at 43-45. As the appellant had not submitted a written reply, the deciding official did not consider any response from her.

¶6 The administrative judge found no violation of the appellant's right to due process. ID at 4-6. The administrative judge explained that the agency "afforded the appellant with numerous opportunities to respond to the charges," but she did not do so, and that the agency did not owe her another extension of time in which to respond, when on February 7, 2012, Miller presented his letter of representation and asked to schedule an oral reply. *Id.*; *see id.* at 4. The administrative judge found the appellant's reliance on *Alford v. Department of Defense*, 118 M.S.P.R. 556 (2013), to be misplaced. ID at 5-6.

¶7 We do not agree with the administrative judge's conclusion, and although the circumstances are not identical, we find that *Alford* nonetheless applies. In *Alford*, the agency notified the appellant that the deciding official intended to rely on new materials beyond those cited in the proposal notice. *Alford*, 118 M.S.P.R. 556, ¶ 5. The agency afforded the appellant 2 weeks from the date he received the proposal notice in which to provide a written reply and to schedule an oral reply regarding the new materials. *Id.* Exactly two weeks after receiving the notice, the appellant sent a letter requesting an oral reply. *Id.* Two days after he mailed the letter, and before it was received, the agency issued the decision letter. *Id.* The administrative judge found that it was "through no fault of the agency" that the appellant's request for a supplemental oral reply reached

the agency after the decision letter had been issued. *Id.*, ¶ 7. The Board rejected such reasoning, explaining that "the June 26, 2009 updated proposal notice afforded the appellant 2 weeks from his receipt of the letter in which to file a written response and/or request an oral reply" and "the timeliness of his response would be measured from the date he deposited his response in the mails." *Id.* By failing to wait for (and thus consider) a response that was timely by the agency's own terms, the agency violated the appellant's right to minimum due process. *Id.*

¶8 The agency contends that the circumstances here are different because the appellant had already received an extension of time in which to file. PFR File, Tab 4 at 7, 11. We find, however, that the appellant and her representative reasonably surmised from the circumstances that she could request an oral reply by February 7, 2012. We start, as the Board did in *Alford*, with the representations made in the agency's notice of proposed removal and find that it allowed the appellant to request an oral reply until the final day of the original response period. IAF (I-1), Tab 5 at 44; *see Alford*, 118 M.S.P.R. 556, ¶ 7. Additionally, the appellant could request until the final day of the original response period an extension of the time in which to respond. IAF (I-1), Tab 5 at 44. The proposal notice states:

> Should you decide to respond, your written response, *or request to provide an oral response* must be received by the agency within 14 calendar days of your receipt of this notice. If more time is required for you to formulate your response, you may request an extension of this deadline.

Id. (emphasis added). When the appellant's union representative requested an extension, the human resources specialist assisting the deciding official responded that, for purposes of offering an oral response, the representative should "ensure you are on [the deciding official's] calendar NLT COB on 7Feb12." *Id.* at 47. An instruction to be "on [the deciding official's] calendar" by February 7, 2012, implies that February 7 was the new deadline for filing a written response *or for requesting an oral reply*. If, as the agency now argues,

February 7 was the deadline for *completing* an oral reply, *see* PFR File, Tab 4 at 7, the agency should have so stated explicitly when issuing the extension. Without an explicit statement of the agency's expectations, the appellant and her representative reasonably concluded that the terms set forth in the proposal notice – the appellant had to submit a written response or request an oral response within 14 days of the notice – applied to the extension period. The agency's current assertion that the terms for the extension period differed from those of the original response period, *see* PFR File, Tab 4 at 7, is not convincing, especially in light of the following.

¶9 First, the agency initially asserted that the appellant's response was untimely in part because the deciding official did not read Miller's email until February 8, 2012. *See* IAF (I-1), Tab 5 at 7. The agency later retracted that claim. *See* IAF (I-3), Tab 11 at 5. The agency's argument then shifted to defining the human resources specialist's intent when she instructed the union representative to be "on the calendar" by February 7, 2012. Second, the human resources specialist's actions, as reflected in the email record, suggest that the agency itself was uncertain as to whether February 7 was the deadline for offering an oral response, or for scheduling one. Some of her actions, moreover, may have even prevented the scheduling of the appellant's oral reply.

¶10 The appellant filed a representation form on February 3, 2012. IAF (I-1), Tab 5 at 49. Miller asked to schedule an oral response at 3:15 p.m. on February 7, 2012. *Id.* at 54-55. Yet, the human resources specialist waited until 4:57 p.m. that day to ask the union if the appellant had been "released" from exclusive representation. *Id.* at 54. The union's executive vice president responded at 8:08 a.m. on February 8, 2012, and explained that the appellant "was entitled to a representative of her choice," and the union was not required to release her. *Id.* At 12:34 p.m. that day, the human resources specialist again emailed the union, asserting that the appellant lacked the right of representation by counsel until the agency issued a final decision. *Id.* at 53. At 12:54 p.m., the union's executive

vice president replied and reasserted that the union did not need to release the appellant from representation. *Id.* Meanwhile, at 12:49 p.m., the human resources specialist warned the deciding official not to contact Miller because such contact before the union released the appellant might create "drama." IAF (I-3), Tab 12, Ex. G. After receiving the union's second email disavowing a requirement to release the appellant, the human resources specialist inaccurately told another agency official that the union "didn't release [the appellant] to obtain outside representation until the day after the extension to her reply had already expired." IAF (I-1), Tab 5 at 53. Even though the appellant's representative waited until the afternoon of February 7, 2012, to request an oral reply, the agency knew that the appellant had retained outside counsel on February 3, 2012. *Id.* at 49. The human resources specialist's failure to contact the union until close of business on February 7, 2012, and her failure to believe the union's initial response, created the delays that the agency claims barred the appellant from offering an oral reply. Because we find that the agency violated the appellant's due process rights, she "is entitled to a new constitutionally correct removal procedure." *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1377 (Fed. Cir. 1999). We thus reverse the removal action. *See Alford*, 118 M.S.P.R. 556, ¶ 7.

¶11 The appellant alleged disability discrimination based on the agency's failure to provide a reasonable accommodation. IAF (I-3), Tab 9 at 2. Notwithstanding our reversal, we affirm the administrative judge's findings with respect to the appellant's disability discrimination claim. Where the record is complete and a hearing has been held, it is unnecessary for the Board to follow the traditional burden-shifting order of analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). Rather, the inquiry shifts from whether the appellant has established a prima facie case to whether she has demonstrated by a preponderance of the evidence that the agency's reason for its actions was a pretext for discrimination. *Jackson v. U.S. Postal Service*, 79 M.S.P.R. 46, 52

(1998). It is unlawful for an agency not to make a reasonable accommodation to the known physical or mental limitations of an otherwise qualified employee with a disability, unless the agency can demonstrate that the accommodation would impose an undue hardship. 29 C.F.R. § 1630.9(a).

¶12 If an agency fails to meet its obligation to accommodate an employee before it removes her, the agency's failure at that time to look for a position as a reasonable accommodation nevertheless does not relieve the appellant of her burden of ultimately showing that such positions existed and were available. *Jackson*, 79 M.S.P.R. at 54. Here, the appellant claimed that she applied for multiple positions primarily involving telephone duty. IAF (I-3), Tab 12 at 8, Ex. C. Although the appellant offered the sworn statement from a coworker, who stated that she helped her apply for those positions, *id.*, Ex. I, the appellant did not submit other evidence that would have shown these positions existed, e.g., copies of vacancy notices, job applications, requests for a reasonable accommodation, etc.

¶13 Even if the agency could have accommodated the appellant by reassigning her, it is unlikely she could have performed the essential functions of the new position. *See Paris v. Department of the Treasury*, 104 M.S.P.R. 331 (2006) ("In a disability discrimination case concerning denial of a reasonable accommodation, the appellant ultimately must prove that he is a qualified person with a disability, i.e., a disabled individual who can perform the essential functions of his position, with or without reasonable accommodation. The appellant cannot prevail merely by 'articulating' a reasonable accommodation."). Although she may have had the requisite nursing skills, the positions were located in the hospital, as was the position from which she was removed. She would have been exposed to the substances that aggravate her condition. *See* IAF (I-1), Tab 5 at 56; IAF (I-3), Tab 12, Exs. I, J. The agency averred that it was unable to modify in-hospital positions for the appellant to allow her to avoid these substances. IAF (I-1), Tab 5 at 56, 61. The agency also averred that it had

unsuccessfully tried to find a suitable position for the appellant outside of the hospital, but she had been less than cooperative in that process. *Id.* at 57-63. Further, the requirement that an agency accommodate a qualified disabled employee is not infinite – it must search its vacancies and take other potentially fruitful steps, but it need not consider reassignment *ad infinitum* or create a position where none exists. *Lynch v. Department of Education*, 31 M.S.P.R. 519, 529-30 (Spec. Pan. 1986), *vacated on other grounds*, 665 F. Supp. 62 (D.D.C. 1987). The appellant thus failed to meet her burden of proof. In contrast, the agency presented unrebutted evidence that it sought to accommodate the appellant's condition. Accordingly, we will not disturb the administrative judge's findings with respect to disability discrimination.

ORDER

¶14 We ORDER the agency to cancel the removal action and to restore the appellant effective February 24, 2012. *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.

¶15 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.

¶16 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).

¶17 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).

¶18 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.

¶19 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.

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.

USDA UNITED STATES DEPARTMENT OF AGRICULTURE

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.