

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

2011 MSPB 75

Docket No. DA-0752-10-0223-I-1

**Reynaldo Alvara,
Appellant,**

v.

**Department of Homeland Security,
Agency.**

August 17, 2011

Gary M. Gilbert, Esquire, and Julie E. Rook, Esquire, Silver Spring,
Maryland, for the appellant.

Lamont D. Nahrgang, Esquire, and Peter Arcuri, Esquire, El Paso, Texas,
for the agency.

BEFORE

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

OPINION AND ORDER

¶1 This case is before the Board on the appellant's petition for review of the initial decision that affirmed his removal, finding that he did not establish his claim of disability discrimination. For the reasons set forth below, the Board AFFIRMS the initial decision as MODIFIED, still AFFIRMING the agency's action.

BACKGROUND

¶2 The appellant, a GS-11 Customs and Border Patrol Officer (CBPO), suffers from sleep apnea, a permanent condition which requires him to get 8 hours of nocturnal sleep and which thereby precludes him from working the graveyard shift or performing substantial amounts of overtime, both features of his position. Initial Appeal File (IAF), Tab 7b at 41, 80-88, 89-102. The agency accommodated him for some time, but when a new Port Director was appointed, she began to examine the workload assignment situation, specifically, the number of CBPOs who, for a variety of reasons, were on light duty. Compact Disc (CD), testimony of Ana Hinojosa. She found that the appellant could not perform the full range of his duties. In response to his request for accommodation, she found that not requiring him to work the graveyard shift and substantial overtime on a permanent basis was not a reasonable accommodation. *Id.* She directed the agency to undertake a search for other suitable positions within the appellant's commuting area that he could perform, but none were found. She offered to extend the search outside the commuting area, but the appellant declined. IAF, Tab 7a at 65, 41-42. Accordingly, she effected his removal for physical inability to perform. *Id.* at 39-41.

¶3 On appeal, the appellant renewed his claim of disability discrimination, arguing that the agency failed to reasonably accommodate his disability by not allowing him to work a stable schedule. *Id.*, Tab 1. And, he claimed that the agency's action constituted retaliation for his protected equal employment opportunity (EEO) activity, specifically, requesting reasonable accommodation. *Id.*, Tab 21.

¶4 After conducting the requested hearing, the administrative judge issued an initial decision in which she sustained the charge, finding that the agency showed that the appellant is physically unable to meet the conditions of his employment due to his medical condition. *Id.*, Tab 28, Initial Decision (ID) at 8-9. She then

addressed his claim of disability discrimination.¹ She found that he is disabled, *id.* at 10, but, after reviewing all of the hearing testimony,² *id.* at 10-22, she found that he did not establish that he is a qualified individual with a disability because he did not show that he can perform the essential functions of his position with or without accommodation. *Id.* at 22. She found that the accommodation he requested, not having to work rotational shifts and overtime, was a request to change the essential functions of his job. *Id.* She considered whether the agency could accommodate the appellant's condition by reassigning him to a vacant position but found that none was available within his commuting area and that he had not agreed to an expanded search. *Id.* at 23. The administrative judge concluded that the appellant had failed to identify any reasonable accommodation that would have allowed him to continue working and that he therefore did not establish disability discrimination. *Id.* She then found that he did not establish that the agency retaliated against him for engaging in

¹ In setting out the appellant's burden of proof regarding his claim of disability discrimination in the initial decision, the administrative judge stated that he must establish not only that he has a disability, but that he is a qualified individual with a disability, and that he must also articulate to the extent possible a reasonable accommodation under which he believes he could perform the essential duties of his position or of a vacant funded position to which he could be reassigned. *Id.* at 9. The administrative judge's stated approach was not appropriate. At the time of issuance of the initial decision, the record was complete and both parties had had an opportunity to submit evidence on the discrimination issue. At that stage of the proceedings, the proper inquiry was whether the appellant proved, by preponderant evidence, that the agency committed discrimination. *Paris v. Department of the Treasury*, [104 M.S.P.R. 331](#), ¶ 23 (2006). He could not prevail merely by "articulating" a reasonable accommodation. *Id.*, ¶ 24. The administrative judge properly found, however, after reviewing the evidence, that the appellant did not prove that he was a qualified individual with a disability because he did not prove that he was denied reasonable accommodation and that therefore his affirmative defense must be denied. *Id.* at 22-23. Thus, while the administrative judge set out the incorrect standard of proof, she applied the correct standard and so did not prejudice the appellant's substantive rights. *Panter v. Department of the Air Force*, [22 M.S.P.R. 281](#), 282 (1984).

² The only witnesses who testified were six agency managers, all called by both parties. Although approved to testify, the appellant did not do so. IAF, Tab 21 at 7, Tab 27.

protected EEO activity, *id.* at 23-24, and that the agency showed that its action promoted the efficiency of the service and that removal was a reasonable penalty for the sustained charge. *Id.* at 24-25. As such, she affirmed the agency's action. *Id.*

¶5 In his petition for review, the appellant argues that the administrative judge erred in finding that the ability to work the graveyard shift and substantial overtime is an essential function of his position and that his inability to perform those tasks precludes him from being a qualified individual with a disability. Petition for Review (PFR) File, Tab 5 at 13-29. The appellant also argues that the agency failed to establish that his requested accommodation would pose an undue hardship for the agency. *Id.* at 29-32. The agency has responded in opposition to the appellant's petition. *Id.*, Tab 7.

ANALYSIS

¶6 A qualified individual with a disability is a person with the skills, experience, education, and other job-related requirements of the position he holds and who, with or without reasonable accommodation, can perform the essential functions of such position. [29 C.F.R. § 1630.2\(m\)](#). The term "essential functions" means the fundamental job duties of the position, not the marginal functions. [29 C.F.R. § 1630.2\(n\)\(1\)](#). Evidence of whether a particular function is essential includes, but is not limited to, the employer's judgment as to which functions are essential; written job descriptions prepared before advertising or interviewing applicants for the job; the amount of time spent on the job performing the function; the consequences of not requiring the incumbent to perform the function; the terms of a collective bargaining agreement; the work experience of past incumbents in the job; and/or the current work experience of incumbents in similar jobs. 29 C.F.R. § 1630.2(n)(3)(i) – (vii).

¶7 Although the administrative judge did not, in her analysis, specifically cite to the latter regulation of the Equal Employment Opportunity Commission

(EEOC), she nevertheless considered the appropriate factors in determining that the ability to work the graveyard shift and significant overtime is an essential function of the appellant's position. She considered, as evidence of the employer's judgment on the issue, testimony from the Customs and Border Patrol Chief Officer for the Port of El Paso where the appellant was employed, ID at 11-12, the several individuals who served for various portions of time as Acting Port Director (one of whom was the proposing official), *id.* at 13-16, the Mission Support Specialist who was detailed to the Light Duty/Limited Duty Program, *id.* at 16-17, the Diversity and Civil Rights Officer, *id.* at 17-19, and the Director of Field Operations (the deciding official), *id.* at 19-22. All of these witnesses provided reasons why, in their view, the ability to work the graveyard shift and significant overtime is an essential function of the CBPO position. Those reasons included the fact that CBPOs are assigned to work overtime to meet the needs of the agency on any shift, including the graveyard shift, that overtime is necessary in order for the agency to fulfill its mission, that no CBPO has ever been permanently exempted from working overtime or the graveyard shift, although it has been done on a temporary basis, such as to accommodate pregnant or breast-feeding CBPOs, that morale would be adversely affected if certain CBPOs were never required to work overtime, that the requirement that CBPOs be able to work the graveyard shift and significant overtime was a factor in the classifying and grading of the position, and that the appellant's requested accommodation would circumvent the collective bargaining agreement because it imposes limits on how much overtime each employee can be ordered to work. In addition, the administrative judge considered the CBPO position description which includes, among its Special Requirements, that the incumbent "must work on a shift and rotational basis and perform substantial amounts of overtime." ID at 8; IAF, Tab 7a, Subtab 400. And, the administrative judge considered the CBPO's Medical Standards and Physical Requirements which provide that the incumbent "may work extended or unscheduled hours including weekends and holidays and be

required to rotate shifts, assignments and duty stations.” ID at 8; IAF, Tab 7a, Subtab 4pp at 3. Finally, the administrative judge relied upon the EEOC’s findings, in *Bouffard v. Department of Homeland Security*, Appeal No. 0120065257, 2008 WL 276452, at *5 (E.E.O.C. Jan. 16, 2008), that: (1) The ability to work rotational shifts and overtime is an essential function of the CBPO position; and (2) the accommodation of not having to work rotational shifts and overtime is in essence a request to change the essential function of the job which the agency is not required to do. ID at 22.

¶8 In *Bouffard*, the EEOC directly addressed the dispositive issue presented in this case. We note that the Board generally defers to the EEOC on issues of substantive discrimination law unless the EEOC’s decision rests on civil service law for its support or is so unreasonable that it amounts to a violation of civil service law. See, e.g., *Schwartz v. Department of Education*, [113 M.S.P.R. 601](#), ¶ 12 (2010); *Parks v. U.S. Postal Service*, [110 M.S.P.R. 64](#), ¶¶ 6-7 (2008); *Evans v. Department of Homeland Security*, [107 M.S.P.R. 484](#), ¶ 9 (2007); *Kimble v. Department of the Navy*, [70 M.S.P.R. 617](#), 622 (1996); *Ignacio v. U.S. Postal Service*, [30 M.S.P.R. 471](#) (Spec. Pan. 1986). Accordingly, because the *Bouffard* decision involves an issue of substantive discrimination law and is neither based on civil service law or is so unreasonable as to amount to a violation of civil service law, we will defer to the EEOC’s determination that the agency is not required to accommodate a disabled CBPO by granting a request not to work rotational shifts and overtime.

¶9 As noted above, the EEOC, in *Bouffard*, addressed the dispositive issue in this case. Moreover, the appellant’s challenge to the administrative judge’s findings is unavailing. Specifically, the appellant disputes the way in which she analyzed the appropriate factors in considering whether the ability to work the graveyard shift and substantial overtime is an essential factor in the CBPO position. For example, the appellant argues that other CBPOs, namely females who have recently given birth, are exempted from the graveyard shift indefinitely

without any impact to the agency's mission. As noted, the administrative judge considered such evidence but did not find it dispositive of the issue of whether the ability to work the graveyard shift and substantial overtime is an essential function of the CBPO position because, as the agency witnesses explained, the females' condition and their related exemption is temporary whereas the appellant's condition and requested exemption is permanent. ID at 12-16, 19-22. The appellant has failed to show that such a distinction is not a reasonable one. He also challenges the administrative judge's reliance on the CBPO's Medical Standards and Physical Requirements as requiring incumbents to work rotational shifts and significant overtime on the basis that the document provides that the Officer "may" work extended or unscheduled hours and "may" be required to rotate shifts, assignments, and duty stations. Reading this document in conjunction with the position description supports the administrative judge's finding. The use of "may" (along with "required") in the Standards and Requirements does not provide a basis to disregard the position description, which is, on this point, wholly consistent with other evidence, including all of the testimony, that the ability to work the graveyard shift and significant overtime is an essential function of the CBPO position.

¶10 The appellant argues that the administrative judge ignored the fact that the agency exempted him from working the graveyard shift for a period of time with apparently no adverse effect on the agency's mission. As the administrative judge found, the new Port Director who took that position in May 2008 found an unusually large number of employees on light duty and an inconsistent process used to manage them. ID at 19. She also found that a significant portion of those employees had been on light duty for a very long time and that management had not been following up on their progress. For these reasons, the new Port Director undertook to change the way the agency handled light duty. *Id.* The work experience of past incumbents in the job is a factor for consideration under the EEOC's regulations on "essential functions." However, to the extent that the

agency accommodated the appellant for a period of time by eliminating essential functions, it was not obligated to do so indefinitely. *Comerford v. Department of the Navy*, Appeal No. 01A44524, 2006 WL 2096269, at *5 (E.E.O.C. July 21, 2006).

¶11 The appellant argues that the administrative judge erred in failing to consider the availability of other CBPOs to work the graveyard shift. The EEOC's regulations provide that a job function may be essential for any of several reasons, one of which is that there are a limited number of employees available among whom the performance of that job function can be distributed. [29 C.F.R. § 1630.2\(n\)\(2\)\(ii\)](#). By its language, that provision does not require that a function must be considered essential if there are a limited number of such employees. While there was testimony that substantially more CBPOs routinely work at the Port than CBPOs who are required to work the graveyard shift on any particular night, CD (testimony of Acting Port Director William Molaski), there was also testimony that budget and morale implications arise when CBPOs are ordered to work more overtime than their fair share. *Id.* (testimony of Michael Brady, Chief Port Officer). Moreover, the administrative judge's failure to mention all of the evidence of record does not mean that he did not consider it in reaching his decision. *Marques v. Department of Health & Human Services*, [22 M.S.P.R. 129](#), 132 (1984), *aff'd*, 776 F.2d 1062 (Fed. Cir. 1985) (Table).

¶12 The appellant also argues that neither Molaski's testimony, nor deciding official Ana Hinojosa's testimony, was credible and that the administrative judge should have afforded no weight to it. The appellant refers to Molaski's deposition testimony that he did not know what "ADA" stood for and had not, at the time in question, received training on the Rehabilitation Act. IAF, Tab 21, Appellant's Exhibit C at 22, 42. The administrative judge acknowledged Molaski's deposition testimony, ID at 15-16, but did not find him incredible based upon it. The appellant also refers to Hinojosa's testimony that she was not involved in the processing or denying of the appellant's request for reasonable

accommodation. CD. While the administrative judge did not make any specific credibility determinations, she did find that all of the witnesses testified that working rotating shifts and significant amount of overtime were essential functions of the CBPO position. ID at 22. Because that is the dispositive issue in this appeal, the appellant has not by his claims shown that the administrative judge erred in arriving at her determination on that issue.

¶13 The appellant next argues that the agency failed to conduct an analysis of the essential functions of the CBPO position before denying him an accommodation. Even if so, the issue before the administrative judge, with regard to the appellant's defense of disability discrimination, was whether he established that he was disabled and, if so, whether he demonstrated that he was a qualified individual with a disability. To the extent that that analysis included consideration of whether the appellant showed that he could perform the essential functions of his position with or without accommodation, that issue was for the administrative judge to decide de novo and did not depend on whether the agency had conducted a proper analysis at some earlier time. *See Burton v. U.S. Postal Service*, [112 M.S.P.R. 115](#), ¶ 8 (2009).

¶14 Finally, the appellant asserts that, although the agency never argued that exempting the appellant from the graveyard shift would pose an undue hardship, the administrative judge referred to undue hardship in her initial decision, implying that she would find that the appellant's request to be exempted from the graveyard shift would pose an undue hardship on the agency. The appellant goes on to challenge that alternative finding. Based on the administrative judge's finding that the appellant did not establish that he was a qualified individual with a disability because he could not perform the essential functions of his CBPO position with or without reasonable accommodation, the administrative judge found that she need not reach the issue of whether providing his requested accommodation would impose an undue hardship on the agency, although she noted that the EEOC found, in *Cyr v. Department of Homeland Security*, Appeal

No. 01A43015, 2005 WL 1714414, at *2 (E.E.O.C. July 13, 2005), that providing a permanent day shift to an Immigration Inspector would impose an undue hardship on the agency. ID at 22 n.25. As noted, the administrative judge found that the appellant failed to prove that he was a qualified individual with a disability and that he therefore did not establish his claim of disability discrimination. ID at 25-26. Because we agree with the administrative judge's findings, it is unnecessary to address the agency's challenge to her alternative finding as to undue hardship, which is essentially dicta.

ORDER

¶15 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 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 Codes, section 7702(b)(1) ([5 U.S.C. § 7702\(b\)\(1\)](#)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 77960
Washington, DC 20036

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. § 2000e5(f); 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 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.