

FERS Disability Retirement: The Untenable Position

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To be eligible for a FERS disability retirement annuity, an employee must have completed at least 18 months of creditable civilian service, must be unable, because of disease or injury, to render useful and efficient service in his position, and must not have declined a reasonable offer of reassignment to a vacant position in the employing agency at the same or greater grade or pay level in her commuting area in which he is able to render useful and efficient service. 5 U.S.C. § 8451(a); *see also* 5 C.F.R. § 844.103(a). It takes a book to discuss the nature, extent, and quality of the medical evidence an applicant needs to submit to prove to the Office of Personnel Management (OPM) that he is disabled. I will write that book provided my target audience tells me it will read it. This article discusses only how OPM can disqualify an applicant for failing to accept a reasonable accommodation or an offer of a reassignment. This discussion necessarily proceeds from the disability-retirement provisions of the FERS statute to OPM's implementing regulations and finally to the decisions of the Merit Systems Protection (Board) and Court of Appeals for the Federal Circuit (Federal Circuit). By carefully following this route, we will see what pits are in the road and how the knowledgeable applicant can avoid falling into them. The trip is worth taking because it would be a shame for the applicant to lose out on a million-dollar annuity if he could avoid disqualification by taking a few, simple precautions.

FERS Disability-Retirement Provisions

5 U.S.C. § 8451 provides in pertinent part:

(a)(1)(A) An employee who completes at least 18 months of civilian service creditable under section 8411 and has become disabled shall be retired on the employee's own application or on application by the employee's agency.

(B) For purposes of this subsection, an employee shall be considered disabled only if the employee is found by the Office [of Personnel Management] to be unable, because of disease or injury, to render useful and efficient service in the employee's position.

(2)(A) Notwithstanding paragraph (1), an employee shall not be eligible for disability retirement under this section if the employee has declined a reasonable offer of reassignment to a vacant position in the employee's agency for which the employee is qualified if the position--

- (i) is at the same grade (or pay level) as the employee's most recent grade (or pay level) or higher;
- (ii) is within the employee's commuting area; and

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(iii) is one in which the employee would be able to render useful and efficient service.

(B) An employee who is applying for disability retirement under this subchapter shall be considered for reassignment by the employee's agency to a vacant position described in subparagraph (A) in accordance with such procedures as the Office shall by regulation prescribe

....

(D) For purposes of subparagraph (A), an employee of the United States Postal Service shall not be considered qualified for a position if such position is in a different craft or if reassignment to such position would be inconsistent with the terms of a collective- bargaining agreement covering the employee.

OPM defines "vacant position" as:

Vacant position means an unoccupied position of the same grade or pay level and tenure for which the employee is qualified for reassignment that is located in the same commuting area and, except in the case of a military reserve technician, is serviced by the same appointing authority of the employing agency. The vacant position must be full time, unless the employee's current position is less than full time, in which case the vacant position must have a work schedule of no less time than that of the current position. In the case of an employee of the United States Postal Service, a vacant position does not include a position in a different craft or a position to which reassignment would be inconsistent with the terms of a collective bargaining agreement covering the employee.

5 CFR § 844.102

Never content to leave bad enough alone, OPM imposed one additional requirement---the impossibility of a reasonable accommodation. 5 C.F.R. § 844.103(4) provides:

Accommodation of the disabling medical condition in the position held must be unreasonable.

Unreasonable Accommodations :A side trip to the Rehabilitation Act of 1973

The pairing of "reasonable" and its antonym with "accommodation" ought to be familiar to readers of my blog articles. <http://fedemplaw.blogcollective.com/blog>. Indeed, I wrote

about the plight of a “fictional” letter carrier who unsuccessfully tried to persuade his postmaster to provide him with an ergonomic chair to accommodate his orthopedic disabilities in a limited-duty assignment. The article was entitled, “The Letter Carrier and the Chair: An Unreasonable Accommodation,” and you can read it on my blog. The punch line of the article is that under the Rehabilitation Act of 1973 (remember: the Americans with Disabilities Act does not apply to us), the letter carrier was not entitled to the ergonomic chair in his limited-duty assignment because that accommodation would not have enabled him to perform the essential functions of his position. In other words, the chair would have not enabled him to carry the mail, which is what letter carriers are paid to do. Readers may remember that the Equal Employment Opportunity Commission (“Commission”) defines a “reasonable accommodation”: as

(1) The term reasonable accommodation means:

...

(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the *essential functions* of that position.

(Italics added.) 29 C.F.R. § 1630.2(o)(1)(ii)

Compare the Commission’s definition of “reasonable accommodation” with OPM’s definition of “accommodation” under FERS. 5 C.F.R. § 844.102 provides:

Accommodation means an adjustment made to an employee’s job or work environment that enables the employee to perform the *duties of the position*. Reasonable accommodation may include modifying the worksite; adjusting the work schedule; restructuring the job; obtaining or modifying equipment or devices; providing interpreters, readers, or personal assistants; and reassigning or retraining the employee.

(Italics added.)

What duties are OPM referring to? All of the duties; some of the duties; and, if only some, which ones? Can it be that under the Rehabilitation Act, an accommodation is reasonable only if it enables the employee to perform the *essential functions* of his position, but that under FERS, an accommodation is reasonable even if it enables the employee to perform only menial tasks? Should not FERS and the Rehabilitation Act be consistent? Should not they be construed *in pari materia* as lawyers are fond of saying? (Statutes in “*pari materia*,” which are statutes relating to same subject-matter, must be construed together. *Lucchesi v. State Board of Equalization*, 31 P.2d 800, 802, 137 Cal.App. 478.)

In *Bracey v. Office of Personnel Management*, 236 F.3d 1356 (Fed. Cir. 2001), the Federal Circuit stated that the meaning of “accommodation” under CSRS and “reasonable accommodation” under the Rehabilitation Act are not inconsistent but the same (more or less). In *Gooden v. Office of Personnel Management*, 471 F.3d 1275 (Fed. Cir. 2006), the Federal Circuit tethered reasonable accommodation to OPM’s definition of “useful and efficient service” and held that for an accommodation to be reasonable it had to enable the applicant to render “acceptable performance of the critical or essential elements of the position.”

The Bracey Decision

Bruce A. Bracey was a civilian employee of the Navy at the Naval Aviation Depot in Norfolk, Virginia, where he held the position of Electronics Worker, WG-2604-8. In 1991, he suffered several work-related injuries in response to which Navy assigned Mr. Bracey to the light-duty shop at the facility where he worked. He was working when the Navy separated him as a result of a reduction in force that accompanied the closure of the Naval Aviation Depot. While he was assigned to the light-duty shop, Mr. Bracey encumbered an Electronics Worker position, but the tasks he performed were not those of an Electronics Worker. Before the facility was closed, Mr. Bracey filed an application for disability retirement. OPM, however, denied the application, finding that although his injuries prevented him from performing the duties of his Electronics Worker position, he was not entitled to disability retirement because his employing agency had accommodated his medical condition by providing him with light-duty work that was within his medical restrictions and was not temporary in nature. Mr. Bracey appealed OPM’s reconsideration decision to the Board and the Board’s Administrative Judge (AJ) reversed OPM. OPM petitioned the Board to review the AJ’s Initial Decision and in a 2-1 decision, the Board reversed the AJ. The majority acknowledged that the duties Mr. Bracey performed in his light-duty assignment were not the duties of his official position, but nonetheless concluded that because he had retained the grade and pay of his Electronics Worker position, he was not eligible for disability retirement. The Board held that it was sufficient that the agency “could gainfully employ” Mr. Bracey, even if it “could not do so in his official position of record or within the confines of another officially established position description.” Mr. Bracey appealed to the Federal Circuit, which reversed the Board and ordered OPM to grant Mr. Bracey a CSRS disability annuity.

Although on appeal OPM conceded that Mr. Bracey was unable to perform the duties of his official Electronics Worker position and that the light duties to which he was assigned were not those of his official position but “were those of a lower-graded job,” it argued that Mr. Bracey’s light-duty assignment constituted an “accommodation” of his disability within his Electronics Worker position. For that reason, OPM maintained, Mr. Bracey was ineligible for disability retirement. The Federal Circuit disagreed and said that, “The problem with that argument is that it runs headlong into the regulatory definitions of ‘useful and efficient service’ and ‘accommodation.’” The Federal Circuit pointed out that under OPM’s CSRS regulation, “useful and efficient service” is defined as

“acceptable performance of the critical or essential elements of the position.” 5 C.F.R. § 831.1202. Since OPM conceded that that Mr. Bracey did not perform the duties of his official Electronics Worker position, but performed the duties of a lower-graded position, it follows that he did not perform the “critical or essential elements” of the Electronics Worker position in his light-duty assignment. “He thus was not able to render ‘useful and efficient service in [his] position,’ 5 U.S.C. § 8337(a), as that phrase is defined in OPM’s regulations.” *Id.* at 1360.

OPM asserted that the Court’s interpretation of reasonable accommodation under CSRS was inconsistent with the Equal Employment Opportunity Commission’s definition of that term under the Rehabilitation Act. The Court rejected that argument, too, noting that under the Commission’s regulation, the accommodation must enable the employee to perform the “essential functions” of his position. *Id.* at 1362. The Court reminded OPM that under its Rehabilitation Act precedents “An agency is not required to create a light-duty position for the employee” since such an assignment would not enable the employee to perform the essential functions of his position. *Id.* at 1362. See also *Ruiz v. Potter*, EEOC DOC 0120071918 (June 6, 2007) (“We also note that the Rehabilitation Act does not impose an obligation on the part of the agency to “make work” for a person with a disability.”)

OPM conceded that Mr. Bracey had not been reassigned to a vacant position; but argued rather that the position he officially occupied had been so drastically changed to accommodate him that it bore no resemblance to the description of it in the position description. The Court said that the Classification Act of 1949 did not allow such an alteration of his official position:

A “position” in the federal employment system is required to be classified and graded in accordance with the duties, responsibilities, and qualification requirements associated with it. The “resulting position-classification system” is “used in all phases of personnel administration.” 5 U.S.C. § 5101(2). We are aware of no setting in the federal employment system in which an employee is considered to hold a “position” consisting of a set of ungraded, unclassified duties that have been assigned to that employee on an ad hoc basis, and the government has not called our attention to any instance in which the term “position” is used in that manner.

Id. at 1359

The Gooden Decision

Due to a work-related injury on November 30, 2001, FERS member, Michelle Gooden became disabled from performing the duties of a City Letter Carrier. Ms. Gooden filed a

workers compensation claim, was referred to a doctor, and returned to work in January 2002 with physical restrictions that included intermittent lifting of less than five pounds and intermittent standing, walking, and sitting of no more than 2-3 hours. Ms. Gooden was assigned sedentary duties such as filing and answering telephones, and she requested no further accommodations. *Gooden* at 1275.

On March 4, 2002, Ms. Gooden was informed that her workers compensation claim had been denied and her limited-duty assignment was withdrawn. The Postal Service advised Ms. Gooden that if she was unable to assume the full duties of her position, she had the following options: (1) apply for temporary light duty if the disability was temporary in nature; (2) apply for permanent light duty if the disability was permanent; (3) apply for disability retirement; or (4) request accommodation through the Postal Service Reasonable Accommodation Committee. She opted for none; filed a grievance; and was permitted to return to work as a Letter Carrier with restrictions that allowed her only to case the mail. Gooden then violated a last-chance agreement that she had executed before she sustained the compensable injury and the Postal Service removed her for attendance-related reasons. The Reasonable Accommodation Committee invited Ms. Gooden to request a reasonable accommodation but she did not. Ms. Gooden filed an application for a FERS disability retirement; OPM denied it twice; Gooden appealed to MSPB; and the AJ affirmed OPM, finding that Gooden had failed to request an accommodation and had failed to accept assignment to a vacant position. The full Board affirmed and Ms. Gooden appealed to the Federal Circuit, which reversed and ordered OPM to grant Gooden a FERS disability annuity.

By failing to follow the route that you and I are taking, the AJ in *Gooden* missed 5 C.F.R. § 844.103(4), which, as you know, provides, “Accommodation of the disabling medical condition in the position held must be unreasonable.” As you can see, nothing in that regulation requires the applicant to request an accommodation. Acknowledging that the AJ had erred in requiring Ms. Gooden to request an accommodation, OPM argued that the court should remand the case back to MSPB to determine if an accommodation was possible. Unnecessary, said the Federal Circuit, as Ms. Gooden had already proven “that accommodation in her position as City Letter Carrier was unreasonable.” *Id.* at 1279. The record showed that when Gooden returned to work after she filed her grievance, her neurologist restricted her to working no more than four hours a day for four weeks with the following limitations: (1) no lifting more than ten pounds; (2) no standing more than four hours a day, with hourly breaks; (3) no walking more than two hours a day; (4) no operating a motor vehicle; and (5) no stooping, reaching above the shoulders, or frequent bending. *Id.* at 1277. With those restrictions, Gooden could no more carry the mail than the “fictional” carrier in the article on my blog. Hence: “Because Gooden was incapable of performing the ‘essential duties’ of her official position at the time of her removal, and because light duty assignment does not involve the “critical or essential elements” of a City Letter Carrier and thus cannot qualify as an accommodation according to the regulations, the undisputed facts demonstrate that Gooden has proven that accommodation was unreasonable.” *Id.* at 1280.

Bracey's formulation of reasonable accommodation under CSRS is tidier than *Gooden's*, and its components are traceable to their origins. The *Bracey* court "read together" OPM's definition of "accommodation" and "useful and efficient service" and announced that an applicant for a CSRS disability retirement is ineligible for retirement benefits "if the employee, with appropriate adjustments to the job or work environment, can perform the critical or essential elements of his own position." *Bracey* at 1359. *Gooden* adds "essential duties" to its definition but I cannot locate the source or authority for those words. Hereinafter, I will use the *Bracey*¹ definition, but the application of either produces the same result. Regardless of which definition is used, documents relevant to determine whether the applicant is disabled are equally relevant to determine whether he can be accommodated in the last position he held. This is so because *Bracey* and *Gooden* fused the definition of "useful and efficient service" with the definition of "accommodation." In practice this means that for a postal worker, the standard position description, at a minimum, would contain the "essential elements" of his position whereas for a federal employee, his performance standards as well as his position description would have to be considered since the former contains the official listing of the "critical elements" of his position. 5 C.F.R. § 430.207.

The Last Position Occupied: Which is it?

Returning to *Gooden*, did you notice that the Federal Circuit found that Ms. Gooden could not be accommodated in her "official position at the time of removal"? The Court did that for two reasons: First, "The relevant position for determining whether an appellant is entitled to disability retirement is his position of record, i.e., that position to which he was last officially assigned before filing his disability-retirement application." *Ancheta v. Office of Personnel Management*, 92 M.S.P.R. 640, ¶ 15 (2002). Second, OPM, the Board and its Administrative Judges, the Federal Circuit and, yes, even the Postal Service itself have difficulty identifying the position the postal worker officially holds immediately before he files his disability-retirement application. This confusion primarily occurs when the agency "assigns" the applicant to a light-duty or limited-duty "position."

The Hussey Decision

Wizened veterans of the federal service, who have been promised a career-ladder promotion, a performance award, or a geographical reassignment ruefully say to themselves, "I will believe it when I see the 50," referring of course to the Standard Form 50, Notification of Personnel Action. OPM's *The Guide to Processing Personnel Actions*

¹ See also *Marino v. Office of Pers. Mgmt.*, 243 F.3d 1375, 1377-78 (Fed.Cir.2001) (applying *Bracey* to FERS regulations). "In *Bracey*, we held that the adjustment made to the employee's job or work environment must enable the employee to continue to perform the duties of his or her official position. 236 F.3d at 1361. A "light-duty assignment therefore cannot be considered an 'accommodation' as that term is used in the regulations." *Id.* Here, Marino was never assigned to another position within the agency. Until his separation, he maintained his official position of Materials Handler. His assignment to light duties, therefore, was not an accommodation which allowed him to perform the duties of his official position."

subchapter 1-3(b) states that the Standard Form 50 “constitutes official documentation of Federal employment.” Subchapter 1-3(b)2 of the Guide lists the personnel actions that do *not* have to be documented on the SF-50 and a reassignment is *not* on the list. So if Mr. Bracey, for example, had been reassigned from his Electronic Worker position to another position, the Department of Navy would have been required to document that reassignment on an SF-50.

The Board regards the Postal Services’ PS Form 50 (Notification of Personnel Action) to be essentially identical in all respects to an SF-50. For example, the Board has recognized the PS Form 50 as being sufficient proof to determine whether the appellant served under FERS and had more than eight years of civilian federal service, thus meeting the 18-month service requirement. *Galwey v. U.S. Postal Service*, 104 M.S.P.R. 574, 575 (2007). In *Cox-Vaughn v. U.S. Postal Service*, 100 M.S.P.R. 246, 249 (2005), the Board adverted to the PS Form 50 as conclusive evidence that Ms. Vaughn had completed more than 1 year of current continuous service as a mailhandler as was thus entitled to appeal her removal to the Board. See 5 U.S.C. §§ 7511(a)(1)(B), 7512(1), (2). The Board has also recognized that the PS Form 50 documents the effective date of a postal workers’ retirement. *Hatch v. Office of Personnel Management*, 100 M.S.P.R. 204, 205 (2005). Within the past few days, the Board has recognized that the PS Form 50 documents not only the nature of the personnel action taken and its effective date, but also the reason it was taken. *Hartssock-Shaw v. Office of Personnel Management*, 2007 MSPB 222 (2007). In that FERS disability-retirement appeal, the appellant claimed that she was entitled to the *Bruner* presumption² because she had been separated from the Postal Service because she was medically unable to perform the duties of a mail handler. The Board reviewed the PS Form 50, which inexplicably the AJ overlooked entirely, but could not discern therefrom the reason for her removal. The Board remanded the appeal back to the AJ presumably to fetch a readable copy of the PS Form 50 and to apply *Bruner* if warranted.

It is therefore surprising that the Board could not determine what position Debra G. Hussey held when she applied for a disability retirement on April 24, 2005 because staring the Board in the face was a PS Form 50 bearing the same date that said Ms. Hussey was a General Clerk. *Hussey v. Office of Personnel Management*, 102 M.S.P.R. 324 (2006).

Ms. Hussey began working for the Postal Service on January 3, 1987, as a City Letter Carrier. Sometime thereafter, she sustained a compensable injury to her foot. In November, 1997, she “was assigned to a Modified City Letter Carrier job when her foot pain allegedly first became disabling.” On July 31, 2001, she was offered and accepted a PS-5 “Full Time Modified General Clerk” “rehabilitation position.” On January 4, 2005,

² *Bruner v. Office of Personnel Management*, 996 F.2d 290, 294 (Fed. Cir. 1993) holds that an employee’s removal for physical inability to perform the essential functions of her position constitutes *prima facie* evidence that she is entitled to disability retirement; the burden of production then shifts to OPM to produce evidence sufficient to support a finding that the applicant is not entitled to disability retirement benefits; and if OPM produces such evidence, the applicant must then come forward with evidence to rebut OPM’s assertion that she is not entitled to benefits.

the she was offered a “Modified Assignment (Limited Duty)’ job,” which she accepted on January 18, 2005.

On April 24, 2005, she filed an application for disability retirement with OPM, claiming that she has been unable to return to her previous position as a City Letter Carrier since November 4, 1997, due to foot pain, knee pain, stress, high blood pressure and stomach conditions. She stated that the Postal Service accommodated her medical limitations until recently when she was notified in December 2004 that her “rehabilitation position” since 2001 was no longer available. She also stated that she was told that the work she was doing belonged to other employees and that those employees would simply have to learn to do their own work. She further stated that on January 4, 2005, she was offered a “modified limited duty offer,” which she accepted on January 18, 2005, but that on February 2, 2005, she was informed that she should consider all previous job offers rescinded. Since that date, she stated that she has been given no more than an hour of work each day. OPM denied the Ms. Hussey 's application, finding that she had failed to establish that she had a medical condition that prevented her from performing the duties of her Modified General Clerk “position.” Ms. Hussey appealed to the Board.

After holding a hearing, the AJ affirmed OPM's decision, finding that the Ms. Hussey's position of record was Modified General Clerk, not Modified City Letter Carrier. She then found that Ms. Hussey did not show that her medical condition prevented her from performing the duties of her Modified General Clerk position or required her persistent absence from the workplace. Accordingly, she found that the appellant did not establish that she was entitled to disability retirement benefits.

In her PFR to the full Board, Ms. Hussey argued that her position of record for purposes of determining her entitlement to disability retirement is the “letter carrier” position. The Board remanded the appeal to the AJ for further record development because the Board could not determine what position she held. The Board was wrong.

Handbook EL-505

The first question is: when Ms. Hussey “was assigned to a Modified City Letter Carrier job ”in November, 1997 did she cease being a City Letter Carrier? Absolutely not.

According to Handbook EL-505 the Postal Service is to consider possible placement of employees who sustain compensable injuries (read: FECA/OWCP) in accordance with the following priorities:

- Employee's current position. If the employee is a current employee (was never separated from the USPS rolls) and is capable of performing his or her core duties with only minor modification, assignment to the current position may be feasible. This type of accommodation is not considered a

modified assignment, and the workhours are charged to the regular operation LDC.

-Reassignment to an existing position. If a current employee can no longer perform the core duties of his or her position but is capable of performing the core duties of another authorized position for which he or she is qualified, reassignment may be offered. Since the employee is performing the core duties of the position, the workhours are charged to the regular operation LDC.

-Residual vacancy. If a vacancy has been posted for bid or application and there are no successful bidders or applicants, both current and former employees may be offered a residual vacancy if they can perform the core duties of the position with only minor modification. Again, since the core duties are being performed, this is not considered a modified assignment and the workhours are charged to the regular operation LDC.

-Modified assignment. If a current or former employee's restrictions prohibit accommodation as described in the categories above, individual tasks must be identified and combined to develop a modified assignment consistent with the employee's medical restrictions. These tasks are usually subfunctions and may be from multiple positions. The workhours for employees accommodated in modified assignments are charged to LDC 69.

Ancheta v. Office of Personnel Management, 95 M.S.P.R. 343, 348 -349 (2003) (*Ancheta II*)

According to this hierarchy, if Ms. Hussey could have been accommodated in her City Letter Carrier position, she would have been; if she could have been reassigned to an existing position, she would have been; if she could have been reassigned to a vacant position without violating the terms of the collective bargaining agreement, she would have been. But she was not. She was given a “modified assignment.” But to what? Certainly not to a different position than the one she held. As the Board stated in *Ancheta II*, Handbook EL-505 demonstrates “that individual tasks that do not constitute the core functions of an existing position, identified and combined to develop a modified assignment consistent with an injured employee's medical restriction, do not constitute a ‘position’ as that term is used within the Postal Service.” *Ancheta II*, at 95 M.S.P.R. 349. Accordingly, it was a waste of time for the Board to have required the AJ to determine if the “Modified City Letter Carrier job” was the last position Ms. Hussey held before she applied for disability retirement because, by definition, it cannot be a position at all.

We know next that on July 31, 2001, Ms. Hussey was offered and accepted a PS-5 “Full Time Modified General Clerk” “rehabilitation position.” But did actually happen on July 31, 2001? I do not think so. For the record contains a PS Form 50 that states that, effective August 11, 2001, the appellant's position was “General Clerk, Occupation Code 2340-01XX.” Under “Nature of Personnel Action,” “Change to Lower Level,” was indicated. *Id.* Under the remarks section, the PS Form 50 stated: “Converted to pay schedule 2 per agreement between USPS and APWU employee accepted rehabilitation offer effective 08/11/2001.” *Hussey* at 327 -328. Did you notice that the PS Form 50 did not say anything about “Modified General Clerk” or “rehabilitation position” or any other such rubbish? Effective August 11, 2001, Ms. Hussey became a General Clerk, plain and simple. That does not mean that, as a General Clerk, she was not given a “modified assignment” in accordance with EL-505. It just means that she was a General Clerk, and the record shows that she remained a General Clerk to the day she applied to retire on disability. For the record contains a second PS Form 50 “dated April 24, 2005, [that] states that the appellant applied for disability retirement and identifies her position as ‘General Clerk.’” *Hussey* at 328. Granted, the record does contain all manner of other documentation from Ms. Hussey’s supervisor and a Reasonable Accommodation Specialist that might confuse the uninformed about what position Ms. Hussey held, but none of those documents were PS Forms 50 and PS Forms 50 are the inerrant word of God when it comes to documenting the official position a postal worker holds. Accordingly, the Board remanded the appeal for the AJ to determine whether Ms. Hussey was either a Modified General Clerk or a Modified Letter Carrier, when she could be neither. The lesson of the Board’s PS Form 50 cases, cited above, is unmistakable: if you want to know the last position the postal worker occupied before he filed his application for a FERS or CSRS disability annuity, look at the applicant’s most recent PS Form 50. Likewise, if you want to know the position in which the applicant could be reasonably accommodated, again look at the most-recent PS Form 50.

Let’s assume that on remand the AJ found that Ms. Hussey’s position of record was General Clerk and that the Postal Service attempted to accommodate her disability in that position with the “modified assignment.” We know that under *Bracey* she would be ineligible for disability retirement if, with appropriate adjustments to the job or work environment, she could perform “the critical or essential elements of [her] own position.” *Bracey* at 1358-1359. The question arises therefore: in which documents would the AJ find those elements? Of course the AJ would be reading those same documents to determine if Ms. Hussey could perform “useful and efficient service” since *Hussey* inserted that phrase into the definition of “accommodation.”³

³ “We have held that a ‘light-duty’ assignment which does not involve the critical or essential elements of an employee's official position cannot be considered an “accommodation” according to the regulations. *See Bracey v. Office of Pers. Mgmt.*, 236 F.3d 1356, 1360-61 (Fed.Cir.2001) (holding that accommodation under the Civil Service Retirement System regulations requires an adjustment that enables an employee to perform the duties of his official position, not “light-duty” assignments crafted in response to medical restrictions); *Marino v. Office of Pers. Mgmt.*, 243 F.3d 1375, 1377-78 (Fed.Cir.2001) (applying *Bracey* to FERS regulations).” *Gooden* at 471 F.3d 1275, 1279.

I noted above that for postal workers, the standard position description should be consulted to find the applicant's critical or essential elements and for federal employees the position description plus applicant's performance standards should be reviewed. But are these documents conclusive or can they be contradicted by parole evidence or other documents? Neither the Federal Circuit nor the Board has faced this issue much less answered it. I believe that position descriptions promulgated under the Classification Act of 1949 are conclusive and cannot be contradicted.

OPM's TS-107 Classifiers Handbook which defines position description as follows:

Position Description - The official description of management's assignment of duties, responsibilities, and supervisory relationships to a position.

The case law is much the same. In *Combs v. Social Security Administration*, 91 M.S.P.R. 148 (2002) establishes the primacy of the position description as the source the source of the essential functions of the position. In *Combs*, the appellant was a Schedule A appointment who suffered from cerebral palsy. She was removed for inability to maintain regular attendance inability to perform assigned duties for medical reasons. The Board affirmed the removal. In only the third sentence of the Background section of its opinion, the Board launched into a detailed discussion of the appellant's position description:

The position description for the position lists the *critical duties* as including: receiving visitors and telephone calls; delivering messages; reviewing and controlling correspondence, reports and transmittals; routing materials to the managers and staff in the Module; maintaining Standard Form (SF)-7B cards; controlling personnel actions; maintaining time and attendance records; and requisitioning office supplies, maintenance requests and printing services. *Id.*, Subtab 4x.

(Italics added.)

The AJ compared the medical evidence of record against the duties and responsibilities listed in the position description in affirming the charge that the appellant was unable to perform assigned duties because of medical reasons. The Board agreed with this finding. Thus the Board looked to the appellant's position description as the source of the essential functions of her position.

EEOC precedent also establishes the primacy of the position description as the source of a federal employee's essential functions. In *Johnson v. Appel*, 2000 WL 1090146, E.E.O.C. (Jul 13, 2000), the agency proposed to remove complainant from her position as a Clerk Typist in April 1993 due to inability to perform the essential functions of her position, i.e. the time and attendance duties. Ms. Johnson asked the agency to eliminate those duties to accommodate a supposed disability. On May 10, 1993, the position

description of the Clerk (Typing) position was formally changed to make the time and attendance function a critical element. In June 1993, the agency informed complainant that removal of her T&A duties would not constitute a reasonable accommodation because they were an essential function of her position. On appeal, the Commission sustained the finding of the AJ “that the performance of T&A duties was an essential function of complainant's Clerk position.”

To be sure, EEOC allows employers to put into evidence its “judgment as to which functions are essential.” 29 C.F.R. § 1630.2(n)(3)(i). But I cannot point to one case where a federal agency’s judgment overrode a position description on what the essential duties of the position were. For under the Classification Act of 1949, a federal agency’s judgment on what duties are essential must be listed in the position description. If you have any doubt, consider the oath the supervisor signs certifying the accuracy of the position description:

Supervisory Certification. I certify that this is an accurate statement of the *major duties and responsibilities of this position* and its organizational relationships, and that the position is necessary to carry out Government functions for which I am responsible. This certification is made with the knowledge that this information is to be used for statutory purposes relating to appointment and payment of public funds, and that false or misleading statements may constitute violations of such statutes or their implementing regulations.

(Italics added.)

In a FERS disability-retirement application, the problem with the agency’s going beyond the four corners of the position description is not that they will add essential functions; it is that they will subtract or minimize essential functions. For example, letter carriers and postal clerks must be able to carry thirty-five-pound shoulder bags and lift seventy-pound mailbags. See *Adams v. Potter*, 05-5811 (6th Cir. 2006) (unpublished). What if the supervisor stated on the Standard Form 3112B, "Supervisor's Statement" (you all know what that is, right?) that the applicant rarely if ever was required to lift or carry more than twenty pounds? What if the Reasonable Accommodation Coordinator stated on the Standard Form 3112D, "Agency Certification of Reassignment and Accommodation Efforts" (you all know what that is, right?) that the applicant could perform the duties of the modified assignment? You would fire back that under *Ancheta I* and *Ancheta II*⁴ the issue is not what duties the applicant was actually performing but rather what duties he

⁴ *Ancheta v. Office of Personnel Management*, 92 M.S.P.R. 640, ¶ 15 (2002) and *Ancheta v. Office of Personnel Management*, 95 M.S.P.R. 343, ¶¶ 10, 12-14 (2003). See also most recently *Cadman v. Office of Personnel Management* 106 M.S.P.R. 192, 196 (2007).

might be called onto perform in the position to which he was officially assigned. The *Ancheta* decisions provide an excellent segue into a discussion of the final ground for disqualification: reassignment to a vacant position so I will discuss them now.

Reassignment to a Vacant Position: The *Ancheta* Decisions

In April 1994, Visitacion R. Ancheta was appointed to a City Carrier position in the U.S. Postal Service. About a year later, in July 1995, she sustained a work-related injury, subsequently stopped working, and began receiving compensation for wage-loss from the OWCP. In August 1997, she accepted the Postal Service's "[r]ehab job offer" of a Modified Letter Carrier (MLC) position, and 642 returned to work. Effective February 10, 1998, she was removed from her City Carrier position for misconduct. She then filed an application for disability retirement under FERS. OPM denied the application in initial and reconsideration decisions, finding that she failed to establish she was disabled from performing the duties of the MLC position prior to her removal for misconduct. On appeal to the Board, the administrative judge (AJ) held a hearing and then issued the initial decision affirming OPM's final decision on the same grounds set forth by OPM. He found that (1) the agency had, in effect, been able to accommodate the appellant's medical restrictions in the MLC position; and (2) the appellant did not show that she was unable to work in that position because of a disabling medical condition. *Ancheta I* at 641-642.

This was the Board's first crack at applying Bracey (made applicable to FERS in *Marino, supra*) and the Board started out well:

The [Federal Circuit in *Bracey*] explained that an agency's offer of a light duty position that is not officially classified and graded and consists of unclassified, ad hoc duties devised to fit an employee's particular medical restrictions does not qualify as a "vacant position," as that term is used in 5 U.S.C. § 8337(a) and 5 C.F.R. § 831.1202, and therefore does not preclude disability retirement. *Id.* at 1359-60.^{FN3} The court thus concluded that Bracey's assignment to the light-duty shop did not constitute an accommodation within his position of record since he did not perform the critical and essential duties of the position but performed lower-graded duties instead. *Id.* at 1360-61. The court further concluded that the assignment did not constitute a reassignment to a vacant position since the light duty position consisted of "a set of duties selected on an ad hoc basis to fit the needs of a particular disabled employee" and was not a definite, preexisting position that is classified and graded according to its duties, responsibilities,*644 and qualification requirements. *Id.* at

1359-60. In *Marino v. Office of Personnel Management*, 243 F.3d 1375, 1377 (Fed.Cir.2001), the court held that this holding in *Bracey* applies equally to disability retirement applications under FERS, such as is involved here.

The problem with applying *Bracey* to Ms. Ancheta's appeal, as the Board acknowledged, was that the Federal Circuit relied on Classification Act of 1949, which requires that positions in agencies covered by 5 U.S.C. § 5102 be "grouped and identified by classes and grades ..." *Bracey* at 1359-60. Ms. Ancheta, however, was employed by the Postal Service, which is not an agency covered by section 5101. So rather than decide, right then and there, whether *Bracey* was applicable to Postal Service cases, which we know it is---*Gooden, supra*---the Board punted and remanded the appeal back to the AJ to determine if it was. The AJ decided it was and ordered OPM to issue a new reconsideration decision. OPM petitioned for review. The Board affirmed, but ordered the AJ to decide himself if Ms. Ancheta was disabled.

In *Ancheta II*, the Board noted that on remand, OPM filed a brief in which it argued that the Postal Service was bound by the applicable collective bargaining agreement, its own regulations found in section 546 of the Employee and Labor Relations Manual (ELM), and procedures established by the joint Department of Labor/U.S. Postal Service (DOL/USPS) Rehabilitation Program, to accommodate Ms. Ancheta. These are amplified by the way in Handbook EL-505, which sets forth rehabilitation assignment information. According to OPM's brief, the Postal Service assigned a grade, occupational code, level, step and salary to the MLC position it offered the appellant. OPM also noted that the offer to the MLC "position" indicated that the position was "indefinite" and described both the duties of the position and the appellant's medical restrictions. OPM further asserted that rehabilitation positions, which include modified assignments as in the appellant's case, are identified by labor distribution codes (LDC's) which identify the position as a "rehab position" despite the fact that the position may be listed at the same grade and occupational code as the "regular position." On the basis of these assertions, OPM argued that the fact that the Postal Service assigned a different LDC to distinguish the "rehab position" from the "regular position" indicated that the "rehab position" is viewed as a separate position under Postal Service regulations. OPM also asserted that the PS Form 50 documenting the appellant's removal from Federal service showed that the position from which she was removed was assigned an LDC of 69, indicating that the appellant had been rehired under the joint DOL/USPS Rehabilitation Program. OPM also argued that the fact that OWCP terminated the appellant's compensation benefits upon her reassignment to the "rehab position" supported the proposition that the appellant was reassigned to the MLC position before she was removed. Finally, OPM argued that applying *Bracey* in the context of the Postal Service would require the Postal Service to "abandon their contractual obligations," because Postal Service regulations and the collective bargaining agreement provide that disabled employees must be assigned permanent light duty jobs when such jobs are available. *Ancheta II* at 345-346.

The Board's AJ made mincemeat of OPM's *factual* assertions, finding that the PS Form 50, documenting the appellant's removal showed that she was separated from the position of "Carrier (City)." The AJ further noted that the appellant's application package indicated that the application was based on her assertion that she was disabled from that position and that the supervisor's statement submitted in conjunction with the appellant's application identified her position as "Carrier" and identified her date of entry into that position as April 16, 1994. Because the administrative judge found that the Carrier position was the appellant's last position of record, he found that OPM, which had denied the appellant's disability retirement application on the basis of its determination that the appellant was not disabled from performing the duties of the MLC position, had not issued a reconsideration decision addressing the appellant's ability to render useful and efficient service in the relevant position.

Rather than begin by giving you the Board's arcane reasoning, I would like to give you my two cents in response to OPM's arguments in the hope that they will provide context for the Board's rationale. I have seen dozens of rehab offers and I have never seen one that is "indefinite." They always expire when the employee recovers or is separated. These offers moreover are not like generic vacancy announcements that any qualified applicant can fill; the duties are contoured to take into account the employee's medical restrictions. For example, consider the rehab offer that City Letter Carrier Nancy Cadman received:

The written offer for the Modified Clerk position, titled "Modification to Rehabilitation Job Offer," stated that the position was offered pursuant to "the Postal Service's obligation under Chapter 540-547 of the Employee & Labor Relations Manual (ELM) to make work available to employees injured on the job and in conjunction with the United States Department of Labor and the U.S. Postal Service's Rehabilitation Program. These tasks and duties are being created for you and you alone within the Racine Post Office. Once you vacate this position, it will no longer exist."

Cadman v. Office of Personnel Management, 106 M.S.P.R. 192, 196 (2007)

When the Federal Circuit said that a position must be indefinite, they meant it was supposed to survive the employee's occupancy thereof. Moreover, rehab offers cannot be "positions" because "positions" are always competitively filled using a generic vacancy announcement, but rehab offers are extended only to individual employees to accommodate the employee's medical restrictions. In other words, if rehab offers were positions, they would be put up for bid and they are not. OPM is supposedly concerned about the Postal Service violating the CBA. Postal worker unions would raise the roof if a position were written for a particular candidate. Handbook EL-505, moreover, makes it clear that the "LDC" is nothing more than an accounting code. It is like having multiple

check books to use for different expenses. It has hardly anything to do with showing that Ms. Ancheta was reassigned to a different position.

You will also recall that Handbook EL-505 sets forth a hierarchy of four actions postal managers may take to try to extract some work from employees who suffer compensable injuries; these range from making minor modifications to the employee's position to making a modified assignment in which the "tasks are usually subfunctions and may be from multiple positions." The second most desirable alternative, as you know, is "Reassignment to an existing position." *Id.* at 348. But since the Postal Service gave Ms. Ancheta a "modified assignment," the least favorable alternative, one must therefore assume that there was no position vacant to which she could be reassigned (with the union's permission, of course. 5 CFR § 844.402 .) If a modified assignment constituted a reassignment to a vacant position, why would the postal service list modified assignment as a fourth alternative? Why have *two* reassignments as alternatives when one would do for both? The four alternatives are just that; they are mutually exclusive options. By definition, therefore, a "modified assignment" does not result in a reassignment. The employee stays in his position of record even though the duties thereof may bear little resemblance to the standard position description for the position. Accordingly, a rehab offer comprises not a reassignment to a different position, but rather an assignment of duties other than the ones the employee would be expected to perform he if he were not injured. Hopefully, with my preface you will be able to track the Board's explanation why an offer to a "modified position" does not constitute an offer to a vacant position:

In addition, because the OPM regulations define a "vacant position" as an "unoccupied position," the regulations clearly contemplate that a "vacant position" must exist even when it is not filled by a particular employee. However, because the duties of a modified assignment are identified and combined to suit the specific medical limitations of a particular employee, the duties that make up such an assignment do not exist as an identifiable position when the employee for whom the assignment was created is not assigned to those duties. Therefore, despite the fact that the Postal Service may have a contractual duty to offer such an assignment to a compensably- injured employee, such an offer does not constitute "an offer of reassignment to a vacant position" within the meaning of the disability retirement regulations, and an employee's declination of such an offer does not disqualify the employee from eligibility for disability retirement.

Id. at 352 -353.

Don't forget that the issue is not whether the applicant might have been reassigned to a vacancy in which he could perform useful and efficient service, but whether he rejected an offer to be reassigned to a vacant position. 5 C.F.R. § 844.103(a)(5). To go one step

further, the inquiry into whether the applicant can be accommodated does not extend to vacant positions, but ends with his position of record. *Gooden, supra*, overruling the Board's holding in *Delceg v. Office of Personnel Management*, 100 M.S.P.R. 467, 472 (2005) that the applicant must prove that he "was not qualified for reassignment to a vacant position at the same grade or level as the position he last occupied." It is crucial to keep in mind that the once the applicant proves that he is disabled, he can stand pat. As the *Gooden* court said:

The problem with the government's argument is that it apparently requires *Gooden* to request accommodation (or presumably reassignment) in order to prove that she met the "reassignment" requirement of 5 U.S.C. § 844.103(a)(5); as discussed above, the statute and regulation only require that *Gooden* demonstrate that she did not decline an offer of reassignment. See 5 U.S.C. § 8451; 5 C.F.R. § 844.103. Indeed, it would appear that the burden in this case was on the Postal Service to consider whether *Gooden* qualified for reassignment, and if so, to make an offer. See 5 U.S.C. § 8451(a)(2)(B) ("An employee who is applying for disability retirement under this subchapter shall be considered for reassignment by the employee's agency to a vacant position"); 5 C.F.R. § 844.103(b) ("The agency must certify to the Office of Personnel Management (OPM) either that there is no vacant position or that, although it made no offer of reassignment, it considered the individual for a vacant position."). The fact that *Gooden* did not request that the Postal Service make an offer of reassignment does not negate the fact that no offer of reassignment was made or declined

Gooden at 1281-82

Epilogue: *Show me the fifty.*

Have you noticed that, whether it is the Federal Circuit or the Board, the discussion of accommodation morphs seamlessly into the discussion of reassignment? That is problematic since they are two separate grounds for FERS disability-retirement disqualification and the applicant and his representative must take pains to quash both. Since the Board cannot resist commingling these concepts, imagine how difficult it will be for the applicant and his representative. Charlie Mestler, who represented himself, was just plain lucky that the Board stumbled into the correct result in his FERS disability retirement appeal.

Mr. Mestler was employed by the Postal Service as a City Carrier. He developed bilateral carpal tunnel syndrome, which prevented him from performing many of the duties of a Carrier. According to the Board, the Postal Service "assigned" him to "a temporary position" that included duties that were within his medical restrictions, such as answering

telephones, running errands, and delivering express and priority mail. Excuse me for being pedantic but no one has ever been “assigned” to a “position” unless he has exercised his assignment rights after being released from his competitive level by reduction in force. 5 C.F.R. § 351.701. Agencies move employees laterally by “reassignment.” 5 C.F.R. § 335.102. “Temporary position?” What is that? Show me the fifty. If Charlie was reassigned from the position of City Carrier to another position, the Postal Service must produce PS Form 50 documenting that reassignment. *Hartsock-Shaw, supra*.

Charlie filed a FERS disability retirement application which OPM denied because, according to the Board, “the Postal Service had been able to accommodate his medical condition by providing light duty within his medical restrictions.” But wait. I thought that the Postal Service had “assigned” Charlie to a “temporary position.” Did the Postal Service assign Charlie light-duties as a City Carrier or did they reassign him to another position? Show me the fifty.

The Board’s AJ affirmed OPM. Here is how the Board summarized the AJ’s decision:

He found that, while preponderant evidence established that the appellant was unable because of his medical condition to perform useful and efficient service in his City Carrier position, the Postal Service assigned him duties in the light-duty position that were within his medical restrictions. Initial Decision at 2-4. The administrative judge also found that the light-duty assignment constituted an appropriate accommodation for the appellant's medical condition because the Postal Service indicated that he could remain in that position without a time limitation, until an appropriate vacant position became available that was also within his medical restrictions.

We know that the applicant’s medical restrictions are assessed against the physical tasks of the position he occupied immediately before he applied for disability retirement. *Ancheta, supra*. So why would the AJ even mention the City Carrier position if Charlie had been reassigned to the “light-duty position?” But wait. Maybe Charlie was not reassigned to a “temporary position” or even a “light-duty position,” because the Board called the light-duty position a light-duty assignment (which actually makes legal sense). Alas in the last sentence the Board relapsed and called the light-duty assignment a position. Show me the fifty which will tell you in real time what position the employee encumbers.

In his petition for review of the AJ’s initial decision, Charlie maintained that the assignment of light duties did not constitute a reassignment to a vacant position nor an accommodation of his duties as a letter carrier. In support of his argument, Charlie testified that he grieved the light duties the Postal Service assigned to him, arguing they

were outside of his duties as a letter carrier. In that regard, the Board found that the light duties assigned to Charlie were outside the duties listed in the position description for a letter carrier:

The City Carrier position description requires an incumbent to sort and deliver mail on foot or by vehicle under varying conditions along prescribed routes, Appeal File, Tab 3, subtab D, while the assigned light duties under the Postal Services last Limited-Duty/Modified Job Offer requires the appellant to answer telephones, run errands, update the route book and help other employees with limited duties, *id.*, subtab B.

Id. at 295. (Oops. Did you notice the faux pas? The Board does not appreciate the difference between “light duty” and “limited duty.” So it appears that all along Charlie was given a limited-duty assignment.)

Devotees of *Bracey* will instantly exclaim, “Game over” since *Bracey* holds an appellant is not precluded from receiving disability retirement where an accommodation is merely an ad hoc attempt to assign duties within the appellant's medical restrictions. *Bracey at* 1359-61. Instead, the accommodation must enable the employee to perform the essential duties of his official position. *Id.* So if you want to know what Charlie's official position was when the agency attempted to accommodate his disabilities, then show me the fifty.

But the Board did not then proceed to determine if, with the accommodation, Charlie could perform the essential duties of a Letter Carrier; instead it commingled accommodation principles with reassignment principles and reached the correct result on the accommodation issue for the wrong reason and ignored the reassignment issue entirely.

According to the Board, the Postal Service cannot accommodate an employee by assigning him duties from another craft. *Mestler at* 295. That's just dead wrong. Leaving aside CBA issues, the Postal Service can assign any duties it wants to assign provided the employee is qualified to perform them. It can assign clerk duties to a carrier and if the carrier can perform the essential duties of a letter carrier, the carrier is disqualified for a FERS disability retirement. *Gooden and Bracey, supra.* What the FERS statute prohibits is:

For purposes of subparagraph (A), an employee of the United States Postal Service shall not be considered qualified for a position if such position is in a different craft or if reassignment to such position would be inconsistent with the terms of a collective-bargaining agreement covering the employee.

5 U.S.C.A. § 8451(a)(2)(D)

You can see the Board treated the FERS statute and regs like a restaurant menu, taking one from Column A (accommodation) and one from Column B (reassignment), mixing them in the same plate, and producing goulash.

So the word to the wise is to get that SF-50 or PS Form 50. Clutch it to your heart and take it wherever you go on the road to applying for a FERS disability retirement.

About the author:

Mitchell Kastner served as an Administrative Judge with the United States Merit Systems Protection Board and its predecessor, the United States Civil Service Commission, for ten years. During the last three years of his tenure, he was the Deputy Regional Director of the Board's New York Regional Office. As an Administrative Judge, he conducted hearings and wrote decisions on all of the appeals over which the Board's Regional Offices had jurisdiction, including adverse actions (removals, demotions, and suspensions for more than 14-days); reductions in force; denials of within-grade salary increases; disability retirement reconsideration decisions; legal retirement reconsideration decisions; performance-based removals or reductions in grade; OPM suitability determinations; denials of restoration of reemployment rights, and certain terminations of probationary employees.

Since returning to private practice in 1985, he has represented employees before the Board on all of these types of appeals and several others which were added after he left, most notably, representing whistleblowers in Independent Right of Act appeals under the Whistleblower Protection Act of 1989. He has also represented federal employees and postal workers before EEOC and in federal court on claims under all of the federal anti-discrimination laws, including Title VII of the Civil Rights Act of 1964, the Rehabilitation Act of 1973, and the Age Discrimination in Employment Act. With the exception of the National Treasury Employees Union (which employs its own attorneys), he has represented bargaining unit members of every major federal employee and postal service worker union in arbitrations.

He is featured with former MSPB Chairman Daniel Levinson on Dewey Publication's compact disc *MSPB Litigation Techniques*.