

# THE LETTER CARRIER AND THE CHAIR

## Reconsidered

Mitchell Kastner, Esq.  
[mknjlaw@comcast.net](mailto:mknjlaw@comcast.net)  
(732) 873-9555

In the first version of this article, posted on my blog in 2004, I wrote about a hypothetical letter carrier with the United States Postal Service, who, after sustaining a compensable injury to his lumbosacral spine, received a limited-duty assignment to answer the phone in his postmaster's office. Alas, sitting in the postmaster's straight-back chair exacerbated the carrier's low-back pain; and the carrier requested the postmaster to purchase for his use an ergonomic chair, the seat and backrest-height of which could be adjusted, the seat of which could be tilted, and, to boot, the chair was equipped with a lumbar air pump. (I have amplified considerably on the features of the chair to amuse myself while rewriting this article.) Although the chair was available in the postal service's product catalogue, the postmaster refused to shell out a few hundred bucks to purchase the chair for the carrier whom, he suspected, might be feigning (just a tad) the nature and extent of his sitting discomfiture.

Did the postmaster, thereby, violate the carrier's rights under the Rehabilitation Act of 1973 to a reasonable accommodation? "No," I answered in the article because, even if the postmaster had provided the carrier with chair, the carrier still could not carry the mail, which is the *raison d'être* of a letter carrier. I noted that the Rehabilitation Act prohibits discrimination against a "qualified individual with a disability" in regard to the terms, conditions and privileges of employment. 29 U.S.C. § 791(g) (incorporating the standards of the Americans with Disabilities Act (ADA)); see also 29 C.F.R. § 1630.4(i). I further noted that an individual with a disability is "qualified" if he satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without accommodation,

**Achtung: This article gives no legal advice. If you need legal advice, get it from someone competent to dispense it.**

can perform the essential functions of such position.” 29 C.F.R. § 1630.2(m); see also 29 C.F.R. § 1630.3 (exceptions to definition). I concluded that the letter carrier was not a qualified individual with a disability because, even with the ergonomic chair, he still could not deliver the mail, which was the most essential function of all functions performed by a letter carrier. Would the ergonomic chair enable him more comfortably to answer the phone? Yes, but so what? The Commission had already held that duty to make a reasonable accommodation did not include “make-work assignments” to limited-duty positions. *Greene v. Potter*, EEOC Appeal No. 01A13124 (September 19, 2002). If the postal service did not have to give the carrier a limited-duty assignment under the Rehabilitation Act, it follows that it did not have to accommodate him while performing the duties of that assignment.

Or so I thought.

I have re-written my first article about the letter carrier and his chair because recent EEOC decisions may have effectively overruled *Greene*, the facts of which I discuss below in detail.

The postal service gave Marie Greene the Hobson’s choice of accepting reassignment from the letter-carrier craft to the clerk-craft (with a resultant loss in seniority) or being fired. Like our hypothetical letter carrier, Ms. Greene sustained a herniated disk and, also, like the carrier, she was given a limited-duty assignment. The postal service apparently got fed up with this arrangement and allegedly forced Ms. Greene “to sign a job offer [to the clerk craft], which lowered her seniority and changed her off days.” Ms. Greene filed a disability-discrimination complaint in which she alleged that the postal service should have allowed her to continue working in her limited-duty assignment. In a particularly nasty decision, EEOC disagreed and chided Ms. Greene for “misunderstand[ing] our regulations.” According to EEOC,

[A]gencies are not required to restructure positions in a manner which would require the reallocation of essential functions. Restructuring involves the redistribution of marginal, nonessential job functions. Accordingly, the Rehabilitation Act does not require the agency to keep complainant in the carrier craft when, in fact, she cannot perform the essential functions of carrier work with or without an accommodation. To the extent that complainant wanted to perform marginal functions of her original carrier position, we note that the Rehabilitation Act does not require the agency to consider accommodating complainant's restrictions by creating a "make work" limited duty assignment because such an assignment is not a vacant, funded position. See *Saul v. United States Postal Service*, EEOC Appeal No. 01970693 (May 10, 2001).

Ms. Greene petitioned the Commission to reconsider its decision, but lost again:

As stated in the appellate decision, the Rehabilitation Act does not require an agency to create a "make work" position or to reassign the essential functions of a position in order to accommodate an individual with a disability. Moreover, to the extent complainant contends that her limited duty status conferred upon her certain benefits and privileges of employment, we note that while that may be true pursuant to the agency's workers compensation agreements, it is complainant's burden under the Rehabilitation Act to establish that there was a vacant funded position, comparable to the position she held at the time of her reassignment, for which she was qualified and to which she could have been reassigned. See *Bielfelt v. United States Postal Service*, EEOC No. Appeal 01A10475 (June 19, 2002). As the appellate decision found, complainant did not meet this burden.

*Greene v. Potter*, EEOC Request No. 05A30142 (January 13, 2003).

To which "workers compensation agreements" is the Commission referring in *Greene*? More to the point, who is the other party to these "workers compensation agreements"? The Commission is presumably referring to the joint DOL/USPS Rehabilitation Program which the postal service implements in accordance with its regulations found in Section 546 of the ELM and (drilling down even further) in conjunction with Handbook EL 505. See *Anchetta v. Office of Personnel Management*, 95 M.S.P.R. 343, 348 (2003).

According to Handbook EL-505, in identifying a modified job assignment under the joint rehabilitation program, the postal service is to consider possible placement of an injured employee in accordance with the following priorities:

1. -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 work hours are charged to the regular operation LDC.
2. -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 work hours are charged to the regular operation LDC.
3. -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 work hours are charged to the regular operation LDC.
4. -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 work hours for employees accommodated in modified assignments are charged to LDC 69.

*Id.* at 348-49.

Into which of these categories did Ms. Greene fall *before* the postal service forcibly reassigned her to another craft? Clearly, it is not the first category because the Commission said that Ms. Greene “cannot perform the essential functions of carrier work with or without an accommodation.” Accordingly, before the reassignment, the postal service gave Ms. Greene a “modified assignment,” under which she probably performed tasks picked from “subfunctions and may be from multiple positions.” But let’s assume that when the postal service threatened to fire Ms. Greene if she did not accept the reassignment to the clerk craft, she applied for disability retirement instead. Against which position would she have thus applied for a disability-

retirement annuity? The letter-carrier position or the modified assignment “job”? Under *Anchetta, supra*, Ms. Greene would have applied against the letter-carrier position because the modified assignment was not regarded as a “position” at all. *Id.* at 349. Referring to the description of a “modified assignment” in Handbook EL 505, the Board in *Anchetta* found:

Thus, the handbook suggests that the duties performed in a modified assignment, rather than constituting the “core duties” of any particular “position” within the Postal Service, are generally “subfunctions” which may be derived from multiple “positions.” The handbook also suggests that an employee is offered a “modified assignment” only if the employee does not qualify for assignment to her former position, other existing positions, or a residual vacancy. Therefore, despite the fact that the Federal Circuit in *Bracey* relied on provisions of title 5 that do not apply to the Postal Service to support its conclusion that a set of ungraded, unclassified duties that have been assigned to an employee on an ad hoc basis cannot be considered a “position” within the federal employment system, *Bracey*, 236 F.3d at 1359, the Postal Service handbook supports a similar proposition: 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.

*Id.* Since a modified assignment does not constitute a “position” in the postal service and since the hypothetical letter carrier is answering the phone under a modified assignment, the postmaster did not violate his rights under the Rehabilitation Act to a reasonable accommodation because the ergonomic chair would have been utterly useless in assisting the letter carrier to perform any of the essential functions of his position of record: City Carrier. So EEOC in *Greene* and MSPB in *Anchetta* are in agreement with each other and both are in agreement with the Federal Circuit Court of Appeals in *Bracey v. Office of Personnel Management*, 236 F.3d 1356 (Fed. Cir. 2001), the Federal Circuit decision to which the Board referred in *Anchetta*.

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. As a result of his injuries, the Navy assigned Bracey to the light-duty shop at the facility where he worked. He worked there between 1991 and 1993, and again between April 1995 and September 28, 1996, 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, Bracey retained the grade and pay of his Electronics Worker position, but the tasks he performed were not those of an Electronics Worker.

On September 13, 1996, before the facility was closed, Mr. Bracey filed an application for disability retirement under Civil Service Retirement System. OPM, however, denied the application. It found that although his injuries prevented him from performing the duties of an Electronics Worker, he was not entitled to disability retirement because the Navy had accommodated his medical condition by providing him with light-duty work that was within his medical restrictions and was not temporary in nature. Bracey appealed to MSPB, which on petition for review, affirmed OPM's negative reconsideration decision, and Bracey appealed to the Federal Circuit which reversed.

The Federal Circuit first noted that under 5 U.S.C. § 8337(a), an employee is eligible for a Civil Service Retirement System disability retirement if he becomes disabled after completing five years of civilian service. The statute defines "disability" as follows:

Any employee shall be considered to be 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 and is not qualified for reassignment, under procedures prescribed by the Office, to a vacant position which is in the agency at the same grade or level

and in which the employee would be able to render useful and efficient service.

The Federal Circuit then moved to the OPM regulation that elaborated on the statutory definition by providing that an employee is eligible for disability retirement only if (1) the disabling medical condition is expected to continue for at least one year; (2) the condition results in a deficiency in performance, conduct, or attendance, or is incompatible with useful and efficient service or retention in the employee's position; and (3) the agency is unable to accommodate the disabling condition in the employee's position or in an existing vacant position. 5 C.F.R. § 831.1203(a). The regulation defines "accommodation" to mean "an adjustment made to an employee's job or work environment that enables the employee to perform the duties of the position," and it defines "useful and efficient service" to mean "acceptable performance of the critical or essential elements" of the employee's position. 5 C.F.R. § 831.1202. Reading the statute and regulation together, the Federal Circuit determined "that an employee is ineligible for disability retirement in two specific circumstances: (1) if the employee, with appropriate adjustments to the job or work environment, can perform the critical or essential elements of his own position; or (2) if the employee is qualified for reassignment to a vacant position in the agency at the same grade or level as the employee's current position." *Id.* at 1358-59.

On appeal to the Federal Circuit, OPM took both tacks to establish Bracey's ineligibility, arguing that the Navy had reassigned Bracey to a position in the light-duty shop, or, in the alternative, that the Navy was able to accommodate Bracey as an Electronics Worker by giving him light-duty work. The Federal Circuit rejected both arguments, finding on the first that the Navy had not reassigned Bracey to a vacant position because the mishmash of duties the Navy assigned to him after he was injured did not constitute a position under the Classification Act of 1949. On the accommodation argument, the Federal Circuit found that whatever changes the Navy made to

Bracey's work environment, they did not enable him to perform the essential functions of the position of an Electronics Worker, his position of record.

Of relevance to Ms. Greene and our letter carrier and his chair was OPM's argument that the Rehabilitation Act mandates the creation of a limited-duty assignment in lieu of disability retirement. The Federal Circuit also rejected this argument:

The Rehabilitation Act and FECA, OPM suggests, may impose a duty on the employing agency to offer an individual a light-duty assignment in lieu of separation and therefore would conflict with the requirements of section 8337 if that statute is read to authorize disability retirement for an employee who can perform useful work but not within his official position or any other established vacant position in the agency.

Contrary to OPM's contention, nothing in the Rehabilitation Act or its implementing regulations conflicts with our interpretation of the disability retirement scheme. The Rehabilitation Act regulations require that if an employee cannot perform the essential functions of his position even with reasonable accommodation, the agency must reassign the employee to a "vacant position ... at the same grade or level, the essential functions of which the individual would be able to perform with reasonable accommodation if necessary," unless such a reassignment would result in undue hardship to the agency. 29 C.F.R. § 1614.203(g). When an employee cannot perform the essential functions of his position even with reasonable accommodation, "the employee has a duty to identify a vacant, funded position whose essential functions he is capable of performing." *Mengine v. Runyon*, 114 F.3d 415, 420 (3d Cir.1997). An agency is not required to create a light-duty position for the employee. *See Shiring v. Runyon*, 90 F.3d 827, 831 (3d Cir.1996). Therefore, consistent with the disability retirement statute, the Rehabilitation Act requires an agency to provide an employee with work in an existing position only if such work is available and the employee is able to perform the essential duties of that position.

Indeed, OPM's interpretation of "position" in section 8337 would appear to be contrary to the use of that term in the Rehabilitation Act. If "position" were an informal assignment defined simply by the duties an employee is capable of performing, an employee could construct a suitable "position" and require an agency to implement it in order to avoid violating the Act. The *Shiring* court rejected such an argument, explaining:

‘The [light-duty] position to which [Shiring] was temporarily assigned was not an official position, but had been created by the Postal Service to give Shiring something to do on a temporary basis. Therefore, Shiring's suggestion that he would have been qualified to perform the requirements of such a position does not help his case because under the Act employers are not required to create positions specifically for the handicapped employee.’ 90 F.3d at 831. OPM offers no reason why the word “position” should be read differently in these two related contexts.

*Id.* at 1361-62.

If an agency is not required under the Rehabilitation Act to create a limited-duty assignment for an employee, it follows that an agency could abolish it without running afoul of the Rehabilitation Act (although it might thereby violate the Federal Employees Compensation Act). Accordingly the Third Circuit’s decision in *Shiring*, the case cited in *Bracey*, validates the result reached by EEOC in *Greene*, wherein the postal service abolished her modified assignment. But what if the agency does *not* abolish the modified assignment? Can it turn a blind eye to an accommodation needed by a disabled employee performing those modified duties just because he or she cannot perform the essential functions of his/her position of record? As a management lackey through and through, I callously opined in my first article that the letter carrier was not entitled to the ergonomic chair he truly needed because he was not getting paid to answer the phones; he was getting paid to deliver the mail. So let him suffer back pain for all I care. (That’s how it is with us fat cats industrialists.)

In three decisions issued since I published my article, the Commission has held that disabled employees do not lose their rights to a reasonable accommodation while performing modified assignments even if those accommodations won’t help them perform the essential functions of their positions of record. But I will not go down quietly (which is also how it is with us fat cats).

*The Commission's Three Decisions*

*Dellinger v. U.S. Postal Service*, EEOC Appeal No. 07A40040 (September 29, 2005)

Vickie Dellinger, a former Rural Carrier and Distribution Clerk, who was employed at the Troy, Ohio Post Office, filed a formal EEO complaint with the agency on May 7, 1999, alleging that the postal service had discriminated against her on the bases of sex (female) and disability (traumatic brain injury) when: (1) on March 30, 1999, she was instructed by her supervisor to punch out early even though there was a large volume of mail to be worked; and (2) on April 9, 1999, she was advised via telephone not to report for work until further notice, essentially terminating her employment. The facts of *Dellinger* cannot be condensed to show how the decision can be reconciled with *Greene*. So bear with me as I relate them below.

Dellinger began her employment with the postal service in 1979, and in late 1989, she was involved in an off duty automobile accident which left her with permanent partial paralysis on her left side and cognitive impairment. The injury left Dellinger with impaired memory, difficulty in learning new information and physical difficulties. Dellinger's brain injury impaired her ability to walk and impacted her balance, but did not affect her right arm. Dellinger returned to work in 1990 as a light duty employee, working two (2) hours per day with numerous physical restrictions. In 1994, her physical restrictions were modified to include no lifting over 15 pounds, no pushing, no pulling; she could stand up to one hour per tour, with no kneeling, bending or climbing. Ultimately, Dellinger returned to work for eight hours per day sorting mail. The light-duty assignment was within her medical restrictions, and she was able to manually sort and throw mail by using her right hand, although she was unable to throw bundles of mail. In 1998, S1 became her supervisor and the facility decreased the volume of mail that was to be sorted

manually. As a result, Dellinger's work hours were reduced to less than an eight hour day, and she used annual leave to make up for the hours lost. Dellinger's physician then issued new work restrictions stating that she could not lift more than fifty pounds and could drive a vehicle. The agency sought a second opinion, and the agency's physician issued restrictions that were more restrictive than were those issued by Dellinger's physician. On March 30, 1999, Dellinger was sent home early after working four hours, as S1 stated that mail volume was light that day.

On April 9, 1999, Dellinger stated that she finished sorting first class mail and began assisting a new worker in the parcel section. Dellinger stated that she was not throwing parcels herself, but S1 told her to stop throwing parcels. S1 sent Dellinger home that day after she finished sorting the first class mail, and later S1 called Dellinger and told her that she could not return to work until he called her. S1 stated that he consulted with the facility postmaster prior to placing her in an emergency off duty status, and he stopped giving her work hours. On April 22, 1999, the facility Postmaster sent Dellinger a letter indicating that she was unable to perform the full duties of her position as a Distribution Clerk and she would be terminated unless she sought a disability retirement or resigned. Dellinger responded, stating that she sought to remain employed at the facility and requested light duty. The postmaster denied her request to return to work, and ultimately she applied for disability retirement in May of 2000.

Following a hearing, the EEOC's AJ found that Dellinger established that she was an individual with a disability, due to her brain injury which causes cognitive impairment affecting her memory and permanent partial paralysis of her left side. The AJ found that the cognitive impairment affects her short term memory and her ability to learn and walk. In addition, the AJ found that she was a qualified individual with a disability, as she had the skill, experience and education to perform the position of a Distribution Clerk, and she was performing the position at

the time she was told not to return to work. While Dellinger conceded that she was unable to perform all the duties in the position description of a Distribution Clerk, she testified that she was not required to perform all of these duties because of her seniority. The AJ found that Dellinger had been performing the position of the Distribution Clerk at the time she was sent home in April of 1999. Further, the AJ found that Dellinger established that the agency discriminated against her due to her disability when S1 told her not to return to work in a letter dated April 22, 1999. In so finding, the AJ noted that the agency did not demonstrate that Dellinger was a safety risk to herself or others as a reason for terminating her employment. The AJ found that Dellinger had medical restrictions, but was able to perform the duties of a Distribution Clerk to the extent the mail could be manually sorted. As such, the AJ concluded that the agency discriminated against Dellinger on the basis of her disability when she was placed in an off duty status.

The agency issued a FAD rejecting the AJ's decision almost in its entirety; and, on appeal to EEOC, the agency argued that it did not violate the Rehabilitation Act by abolishing her light-duty assignment because she was not entitled to a reasonable accommodation because she could not perform all of the essential functions of her position as a Distribution Clerk. The Commission agreed that she could not perform all of the essential functions of a Distribution Clerk --- and these are my words---provided that the position description was the only source of those essential functions. But the Commission found that the essential functions of Ms. Dellinger's Distribution Clerk's position were made significantly less physically onerous by virtue of her seniority under the collective bargaining agreement. Accordingly, she could perform all the essential functions of a Distribution Clerk as those were modified or eliminated by her seniority. To be sure, if Ms. Dellinger's seniority did not eliminate all of the essential functions that she could not physically

perform, then *Dellinger* is completely and utterly at odds with *Greene* and *Shiring* and by extension with *Bracey* and *Anchetta*. In any case, I believe I am still safe withholding the chair from that ne'er do well letter carrier because, whereas Ms. Dellinger was performing some work that at least resembled that performed by other Distribution Clerks, the letter carrier was only answering the phone.

*Pruneda v. U.S. Postal Service*, EEOC Appeal No. 0720050014 (June 4, 2007)

Sandra Pruneda, a City Letter carrier, sustained on-the-job shoulder injury in 1997, and then injured her knee in 1998. To accommodate her injury-related physical restrictions, the postal service provided Pruneda with various limited-duty assignments, primarily consisting of sedentary "clerical work."

In July 2002, the postal service gave Pruneda another limited duty job offer, ending her detail to the GMF in Austin, Texas, where she performed clerk-type work during normal business hours, and returning her to the modified-carrier assignment at the Bluebonnet post office where she previously worked since 1997. This job offer also changed her duty hours to a 2:30 am to 11 am shift.

Pruneda was not alone: at about the same time, the postal service reassigned many other limited-duty letter carriers, working at postal facilities throughout the Austin area, to the Bluebonnet facility, to work on the 2:30am to 11:00 am shift. The record showed that the 2:30 am to 11:00 am shift was a newly created shift, and that all of the workers reassigned to this shift were exclusively limited-duty employees or "rehab" employees, in modified-carrier jobs. The 2:30 am shift job offers were identical. The reassignments were issued with notice of only a few days or less. Pruneda asserted that this short notice was not only highly unusual, but also constituted an

act of harassment against employees receiving FECA benefits who were given limited-duty assignments.

More specifically, Pruneda alleged that the postal service had effectively “warehoused” its limited-duty/“rehab” employees on a 2:30 am shift. Pruneda asserted that the creation of this shift was designed to harass those injured carriers targeted for the reassignment, and force them to resign or quit. Pruneda asserted that the agency accomplished this goal, in that several employees who received the 2:30 am reassignment to Bluebonnet were forced to resign or take disability retirement because of their inability to work on this atypically early shift. Pruneda argued that there was no need to create this shift because the duties designated to be performed at 2:30 am could have been performed at anytime, to include normal working hours.

After the hearing in which the Commission’s AJ actually visited the Bluebonnet facility, the AJ issued a decision agreeing with Pruneda’s argument on the disability-discrimination claim only. The postal service rejected the AJ’s decision and appealed. The Commission reversed the agency’s final order and agreed with the AJ’s decision. Before analyzing the Commission’s dubious conclusion that Pruneda was a qualified individual with a disability who thereby could not be treated differently than similarly-situated non-disabled employees, I need to alter the facts of the decision to shed light on what I really think motivated the Commission to find against the postal service.

Let’s assume that instead of being disabled, Ms. Pruneda and the other rehab workers were members of a truly downtrodden minority: white, Anglo-Saxon males. Let’s further assume that the postal service within the Central Texas Performance Cluster exiled all male WASPs to the Crawford, Texas GMF to do some menial task in the middle of the night. Do you think that the

Commission would stand for that? Of course not (one hopes). And yet that is precisely what happened to Pruneda and to the members of the class to which she belongs.

Notice I did not say “protected class” because individuals with disabilities can be discriminated against; they do not achieve “protected class” status unless they also meet the definition of “qualified” individuals with a disability, which as you know means that they have to be able to perform the essential functions of their position with or without an accommodation. According to the Commission, Pruneda was a “qualified individual with a disability” because:

Here, consistent with the AJ's finding, the record reflects that in the approximately four years prior to filing the instant complaint, complainant encumbered a modified carrier position, and successfully performed the duties in her modified job offer. As such, we find that the record clearly establishes that complainant is a “qualified” individual with a disability.

Sadly, there is no way to avoid having *Pruneda* crash headlong into *Shiring* and *Greene*. For OFO clearly stated that the duties that Pruneda performed as a modified carrier “primarily consist[ed] of sedentary ‘clerical work.’” Although *Greene* trumps *Pruneda* because it is an “05” reconsideration decision, it looks more and more like my letter carrier will get his chair.

*Holloway v. U.S. Postal Service*, EEOC Appeal No. 0720060070 (October 31, 2008 )

Mark Holloway, a Regular City Carrier, was assigned to a Modified Clerk (Limited Duty) position at the postal service’s Bellevue Station in Richmond, Virginia. In October, 2000, Holloway was diagnosed with plantar fasciitis, an inflammation of the foot that caused him to experience pain when walking. Holloway’s physician asked that he be assigned to a position where he would “only perform work involving sitting, limited/light duty.” In response, the agency assigned Holloway to duties that he could do while sitting, including answering telephones, principally to be performed at Bellevue Station. From time to time, however,

Holloway was temporarily assigned to other locations within Richmond when there was insufficient work available at Bellevue Station. Holloway contended that by requiring him to work at multiple locations, the agency violated his medical restrictions. In specific, Holloway alleged that the agency failed to accommodate him when it required him to report to several different stations to perform his duties. Holloway contended that because traveling between locations required him to walk more than he would have had he worked only in Bellevue Station, the postal service forced him to violate his medical restrictions. The Commission's AJ agreed, the postal service did not and appealed, but the Commission reversed, upholding its AJ.

The AJ found that Holloway was a "qualified individual with a disability" because the evidence showed that he "was satisfactorily performing his assigned duties at the Bellevue Station." The postal service argued that Holloway was not "qualified" because he was not capable of performing the essential functions of any position with or without reasonable accommodation. The postal service asserted that the Modified Clerk (Limited Duty) job Holloway had been performing was not a "position" as that term is used in the Rehabilitation Act. According to the postal service "limited duty assignments are not a vacant funded position, [sic] but a series of cobbled together duties." OFO said that it "was not persuaded" by this argument:

In *Pruneda v. U.S. Postal Service*, EEOC Appeal No. 0720050014 (June 4, 2007) the Commission found that a limited duty letter carrier who had performed modified duties primarily consisting of clerical work for four years was a qualified individual with a disability because she had "successfully performed the duties in her modified job offer," citing *Dellinger v. U.S. Postal Service*, EEOC Appeal No. 07A40040 (September 29, 2005); *Iftikar-Khan v. U.S. Postal Service*, EEOC Appeal No. 07A40137 (December 15, 2005). In this case, the AJ found that complainant was satisfactorily performing his assigned duties. Substantial evidence supports that finding. We find that the AJ's conclusion that complainant was qualified was correct as was her conclusion that the agency violated the Rehabilitation Act when it failed to provide a reasonable accommodation.

OFO drew deeply into its mucus-encrusted sinus cavity, worked up a big loogie, and then spat it directly into the eye of the Federal Circuit Court of Appeals. Please recall that in *Bracey*, the Federal Circuit stated that “If ‘position’ [under the Rehabilitation Act] were an informal assignment defined simply by the duties an employee is capable of performing, an employee could construct a suitable ‘position’ and require an agency to implement it in order to avoid violating the Act.” *Bracey* at 1362. So the postal service was dead on in arguing that Holloway’s Modified Clerk (Limited Duty) job was not a “position,” the essential functions of which Holloway could not perform with or without a reasonable accommodation. It was, as the postal service characterized it, “a series of cobbled together duties.” Of course, no disrespect was thus intended as the postal service was just accurately describing a “modified assignment” from Handbook EI 505:

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 postal service’s argument fell on deaf ears because OFO did not regard “position” as a term of art in *Holloway* whereas it did a few years earlier in *Greene*.

Oh to be able to throw down a few lattes with some of the personnelists with whom I served at the United States Civil Service Commission in the 70s. “Show me the 50s!” we would have shouted after reading *Holloway*. Where *is* the Form PS-50 (Notification of Personnel Action) showing that Mr. Holloway had ever been reassigned from City Letter Carrier to Modified Clerk (Limited Duty)? Nowhere; that’s where, because at all times, Mr. Holloway’s official position of record was that of a Letter Carrier (notice that there was no indication that like Ms. Greene he was reassigned to the Clerk craft). The United States Postal Service, moreover, could not have

reassigned Mr. Holloway to the modified assignment even if it wanted to because, by definition, a reassignment occurs between two positions, and MSPB held in *Anchetta* that a modified assignment is not a position in the United States Postal Service just as the Federal Circuit said it was not one in federal service under the Classification Act of 1949.

So where exactly did OFO believe it would find the essential functions of the modified assignments performed by Holloway, Pruneda, and Dellinger? For if OFO expanded the definition of “position” to include the crazy-quilt of duties taken from this position, that one, and another one, it still needed to determine if these employees could perform the essential functions of the resulting mishmash. One devoutly hopes—nay, prays—that OFO does not believe that the FECA-benefits-receiving employee and his/her physician are allowed to make up those essential functions as they go along. Why would not they eradicate all “essential functions,” thereby insuring differing accommodations in perpetuity as their disabilities waxed and waned? Exactly what essential function does the letter carrier---now waiting any day the arrival of his chair---perform? Answering the phone? Let’s not be naïve: it is a fact, because some NALC officials have told me, that many of those city carriers who actually deliver the mail in rain, sleet, and snow resent carriers on rehab assignments, many of whom, they believe, are malingerers. That’s why the postal service’s National Reassessment Process has stirred so little concern amongst the rank and file of the NALC. Some carriers would not shed a tear if some of those on rehab assignments were forced to be greeters at Walmart. But enough editorializing. Back to the question: where does one find the essential functions of a position? Let’s look at the guidance the Commission gives to employers. <http://www.eeoc.gov/facts/ada17.html>:

## How Are Essential Functions Determined?

Essential functions are the basic job duties that an employee must be able to perform, with or without reasonable accommodation. You should carefully examine each job to determine which functions or tasks are essential to performance. (This is particularly important before taking an employment action such as recruiting, advertising, hiring, promoting or firing).

Factors to consider in determining if a function is essential include:

- **whether the reason the position exists is to perform that function** [boldface added by me],
- the number of other employees available to perform the function or among whom the performance of the function can be distributed, and
- the degree of expertise or skill required to perform the function.

Your judgment as to which functions are essential, and a written job description prepared before advertising or interviewing for a job will be considered by EEOC as evidence of essential functions. Other kinds of evidence that EEOC will consider include:

- the actual work experience of present or past employees in the job,
- the time spent performing a function,
- the consequences of not requiring that an employee perform a function, and
- the terms of a collective bargaining agreement.

The mind boggles reading this guidance. Can you imagine the United States Postal Service posting a vacancy announcement for a \$50K letter-carrier position in which it unashamedly stated that “the reason the position exists is” to answer the postmaster’s phone? “Got a back ache? No problem---we will buy you a \$350 ergonomic chair.” How would the postmaster select a candidate from the thousands of applications, **including mine**, he would be sure to receive?

What questions would he ask during the interview?

It is not I who is making a mockery of the problem. I am simply exploring the real-life, unintended consequences of the three EEOC decisions. In its guidance to employers, the Commission tells them to consult the position descriptions to determine which duties are essential functions. On its web site, APWU maintains up-to-date standard position descriptions

for all crafts. I suggest you look through them [http://www.apwu.org/dept/ind-rel/USPS\\_hbks/EL-Series/EL-201%20Position%20Descriptions%20-%20APWU%20Edition%208-00%20\(20.27%20MB\).pdf](http://www.apwu.org/dept/ind-rel/USPS_hbks/EL-Series/EL-201%20Position%20Descriptions%20-%20APWU%20Edition%208-00%20(20.27%20MB).pdf). You will not find therein a position description that even remotely describes the duties and responsibilities performed by Holloway, Pruneda, or the letter carrier who by now must surely have his chair. Without a position description that describes what they do, to which bargaining unit do Holloway and Pruneda belong? Apparently EEOC is unconcerned about such a labor-management trifling, but the craft unions surely are concerned. (I am being rhetorical here because rehab employees, irrespective of the duties they are performing, belong to the bargaining unit that includes the official position they hold as stated on the Form PS-50.)

I could go on, but I have to run. I need to brush up on my telephone-answering skills. I have a huge interview coming up.

#### 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 these types of appeals and several others which were added after he left, most notably, representing whistleblowers in Independent Right of Action 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*.

You can call Mr. Kastner at (732) 873-9555. You can read all of his articles on his blog: <http://fedemplaw.blogcollective.com/blog>. Mr. Kastner is building a web site devoted exclusively to FERS disability-retirement applications, which he hopes to be the primary focus of his law practice.