UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

AARON L. JOHNSON, Appellant, v. DEPARTMENT OF THE NAVY, Agency.	DOCKET NUMBER BN03519202841I1 DATE: JUL 16 1993

Elmer L. Harmon, American Federation of Government Employees, East Machias, Maine, and Alan D. Mulherin, American Federation of Government Employees, Canton, Massachusetts, for the appellant.

Lt. Sigurd R. Peterson, Jr., Esquire, Naval Air Station, Brunswick, Maine, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The agency petitions for review of the October 30, 1992 initial decision that reversed the agency's action separating the appellant pursuant to a reduction in force (RIF). The appellant has filed a motion to dismiss the petition for review. For the reasons set forth below, we DENY the motion to dismiss, GRANT the petition for review, REVERSE the initial

decision, and SUSTAIN the agency's decision to separate the appellant.

BACKGROUND

The agency appointed the appellant to the position of Food Service Worker at the Naval Computer and Telecommunications Station in Cutler, Maine, on December 19, 1980. Initial Appeal File (IAF), Tab 6, Subtab 4p. By notice dated April 28, 1992, the agency advised the appellant that he had been reached for release from his competitive level pursuant to a RIF; it offered the appellant placement in the position of Security Guard, contingent upon his passing a physical examination. *Id.*, Subtab 4k. The appellant accepted the offer and underwent a physical examination. *Id.*, Subtabs 4g, 4h, 4i, 4j. The examination, which was conducted by the agency's physician on May 4 and May 9, 1992, revealed that the appellant suffers from diabetes mellitus. *Id.*, Subtab 4b; Hearing Tape (HT) 1. By notice dated May 12, 1992, the agency advised the appellant that he would be separated effective June 29, 1992, because he was not physically qualified for the Security Guard position. IAF, Tabs, 4c, 4d.

The appellant contested the separation in a timely filed petition for appeal, contending that he is physically qualified for the Security Guard position and, additionally, that the agency committed harmful procedural error in not notifying him prior to the separation of his right to submit

medical information.[1] IAF, Tabs 1, 10. Following a hearing, the administrative judge reversed the separation on the ground that the agency had failed to prove that the appellant was not physically qualified for the Security Guard position. IAF, Tab 13 at 6. She rejected the appellant's claim of harmful procedural error. *Id.* at 7. The administrative judge therefore ordered the agency to cancel the separation, to place the appellant in the Security Guard position effective June 29, 1992, and to provide the appellant with interim relief effective as of the date the initial decision was issued if the agency were to file a petition for review. *Id.* at 7-8.

In its timely filed petition for review, the agency argues that the initial decision rests on an erroneous interpretation of the Federal Personnel Manual (FPM). Petition for Review (PRF) File, Tab 1. The appellant maintains in response that the initial decision was correct, and also asks the Board to dismiss the petition for review on the ground that the agency has failed to provide interim relief. *Id.*, Tab 3. The appellant does not challenge the administrative judge's holding that the agency did not commit harmful procedural error.

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[1] The parties stipulated that the agency had a legitimate reason for conducting the RIF and that the appellant's competitive area, competitive level, retention group, retention subgroup, and adjusted service computation date were correctly determined. IAF, Tab 12; HT 1.

ANALYSIS

The agency has provided the appellant with interim relief in accordance with the initial decision.

According to the appellant, the agency has failed to comply with the administrative judge's order regarding interim relief because it did not reinstate him until November 23, 1992. PRF, Tab 1. The appellant also alleges that the agency initially offered him a Custodian position following the issuance of the initial decision, and only after he objected did it place him in the Security Guard position; he further alleges that the agency has detailed him to the Custodian position. *Id.*

Along with its petition for review, the agency has submitted the affidavit of Donald Labonte of its Human Resources Office. PRF, Tab 1 (attachment). Labonte avers that the appellant was placed in the position of Security Guard effective October 30, 1992 (the date of the initial decision), and that he is drawing pay at his pre-separation rate. The agency has also submitted an SF-50, executed November 25, 1992, that reflects the representations in Labonte's affidavit. *Id.* *See* 5 C.F.R. § 1201.115(b)(4) (an agency petition for review will be dismissed if the agency does not submit evidence that it has complied with an administrative judge's interim relief order).

Contrary to the appellant's assertion, the fact that the agency did not take the appropriate personnel action until November 25, 1992, does not render the action insufficient.

Interim relief must be effective as of the date of the initial decision, 5 U.S.C. § 7701(b)(2)(A); *Moore v. Department of the Navy*, 55 M.S.P.R. 73, 74 (1992), but there is no requirement that the agency take the appropriate personnel action on the very day the that the initial decision is issued. Indeed, such a requirement would impose upon the agency the impossible burden of anticipating which day an initial decision will be issued, whether it will order interim relief, and, if so, what is required by the interim relief order. Thus, the appellant's suggestion that the agency improperly "back-dated" his personnel records is misplaced.

With respect to the appellant's detail to the Custodian position, the appellant has not shown (or even explicitly argued) that the detail was made in bad faith. *See Perry v. U.S. Postal Service*, 54 M.S.P.R. 481, 484 (1992) (where the initial decision reversed the agency's action demoting the appellant from EAS-20 Postmaster to EAS-18 Tour Superintendent and required interim relief if the agency filed a petition for review, the agency's decision to assign the appellant to an EAS-20 Tour Superintendent position pending the outcome of Board proceedings did not warrant dismissal of its petition, where the appellant did not demonstrate that the assignment was made in bad faith).

Based on the foregoing, we find the agency to be in compliance with the initial decision's interim relief order. Accordingly, we deny the appellant's motion to dismiss the petition for review.

The administrative judge erred in finding that the agency failed to show that the appellant is not physically qualified for the Security Guard position.

An individual must be, inter alia, physically qualified for a position in order to be placed in that position pursuant to a RIF.[2] 5 C.F.R. § 351.702(a)(2). The description for the Security Guard position that was offered to the appellant provides as follows:

> Incumbent must be in good health and physical condition and be able to function in all types of inclement weather conditions day and night, often under emergency conditions. Must qualify annually in the use of firearms. . . . Operat[es] vehicles at all hours, under sometimes stressful conditions where good judgment, awareness, and alertness are vital. Incumbent is contacted on occasion to man a post or position with short notice.

IAF, Tab 6, Subtab 4n. In addition, the incumbent is required to carry a firearm while on duty. IAF, Tab 11, Subtabs 1, 2.

The appellant's May 4, 1992 blood test revealed a blood glucose level of 476 milligrams/deciliter (mg/dl). IAF, Tab 6, Subtab 4f. Based upon this, as well as upon the results of a urinalysis, *id.*, the agency physician, Robert Abrams, M.D., concluded that the appellant suffered from uncontrolled diabetes mellitus. *Id.*, Subtab 4b. At the appellant's request, Dr. Abrams conducted a second test on May 9, 1992. The second test, based upon a blood sample drawn after the appellant had fasted, showed a blood glucose level of 204

[2] The appellant does not argue in his response to the petition for review, nor did he argue below, that the agency should have offered him a position other than the Security Guard position in question here.

mg/dl. IAF, Subtab 4e; HT 1. Dr. Abrams testified that the second test confirmed his earlier diagnosis. HT 1. He further testified that he could not find the appellant physically qualified for the Security Guard position because uncontrolled diabetes mellitus puts the sufferer at risk of altered consciousness, coma, and impaired vision. *Id.*; *see also* IAF, Tab 6, Subtab 4b (in a memorandum, Dr. Abrams expresses his opinion that an individual suffering from uncontrolled diabetes mellitus should not be placed in a position involving "driving, using a firearm and prolonged standing or walking").

Dr. Abrams fully explained the basis for his findings and conclusions at the hearing. The appellant did not attack his credibility or professional qualifications, nor did he challenge Dr. Abrams' opinion via expert testimony. The administrative judge nevertheless rejected Dr. Abrams' opinion. She noted that the appellant had given unrebutted testimony that he has no chronic complications of diabetes, HT 2, and also noted that the appellant's private physician had opined in a June 1, 1992 letter that the appellant has no employment restrictions. IAF, Tab 10, Ex. E. She thus concluded that the appellant was not unqualified for the Security Guard position. IAF, Tab 13 at 6. In so concluding, the administrative judge relied on FPM Ch. 339, App. A, Sec. 2e (Apr. 28, 1989), entitled "Qualification Guidelines for Specific Medical Conditions," which provides that a diagnosis of diabetes mellitus "is not in and of itself disqualifying

for any position so long as there are no chronic complications of the condition which would pose a hazard to the individual or to others."

We note that the FPM's guidelines regarding disqualification based upon diabetes mellitus make further provision where an "arduous or hazardous position," such as Security Guard, is involved.[3] Under FPM Ch. 339, App. A, Sec. 2e (Apr. 28, 1989), an individual is not disqualified for placement in an arduous or hazardous position based on a diagnosis of diabetes mellitus "if there have been no significant complications (*e.g.*, cardiovascular, visual, renal, neurological) *and* . . . the condition is controlled by diet and/or exercise, or oral medication" (emphasis supplied).[4]

It is undisputed that the appellant has had no significant complications. The issue, then, is whether the appellant effectively countered Dr. Abrams' testimony that the appellant's diabetes is uncontrolled. The only medical evidence introduced by the appellant is a one-page letter from

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[3] As noted by the administrative judge, IAF, Tab 13 at 4 n.*, the Security Guard position is considered an "arduous or hazardous position" within the meaning of the FPM because it requires the incumbent to carry a firearm. *See* FPM, Ch. 339, Subch. 1, Sec. 2(b) (Apr. 28, 1989). The "incumbent's medical condition is . . . an important consideration in determining ability to perform safely and efficiently" in an arduous or hazardous position. *Id.*

[4] The guidelines relating to placement of an individual with insulin-requiring diabetes in an arduous or hazardous position differ from those set forth above, but there is nothing to indicate that the appellant's condition requires insulin.

his private physician, John J. Donaghy, M.D., dated June 1, 1992. IAF, Tab 10, Ex. E. Dr. Donaghy states that, although the appellant suffers from diabetes mellitus, after a single week of dietary therapy ending on May 28, 1992, the appellant's fasting blood glucose level was reduced to 153 mg/dl (according to Dr. Donaghy the "normal level is 80-120" mg/dl). *Id.* Dr. Donaghy opines that the appellant "is responding to dietary therapy, and there are absolutely no restrictions or qualifications regarding employment." *Id.*

Dr. Abrams testified that, based on the information in Dr. Donaghy's letter, he still would not find that the appellant was qualified for the Security Guard position. HT 1.[5] Dr. Abrams testified that "as far as [he] kn[e]w," the appellant's diabetes was "still uncontrolled." *Id.* Dr. Abrams averred that there is nothing to indicate that the appellant's blood glucose level is "steady" at 153 mg/dl and "not on its way down to 40 [mg/dl]," which latter condition would be "dangerous" in Dr. Abrams' view. *Id.* He also explained that a glycosolated hemoglobin test is the preferred method for determining whether a diabetic condition is under "long-term control," but that it did not appear that the appellant had undergone such a test. *Id.*

Again, none of Dr. Abrams' statements were challenged by expert testimony. Although the appellant believes that Dr. Abrams is wrong, and that his condition is under control, he

[5] The letter evidently was not available to Dr. Abrams prior to the appellant's separation.

has not presented persuasive evidence in support of his belief. Dr. Donaghy's unsworn statement that there are no restrictions on the appellant's employment was not subject to cross-examination and appears to be based on a single blood test of a type which Dr. Abrams testified is not the best method for evaluating the long-term control of a diabetic condition. Thus, the appellant's evidence is not of sufficient weight for us to discount the agency medical officer's sworn testimony and reasoned medical opinion that the appellant is not physically qualified to serve as a Security Guard at a military installation. *Cf. Bahm v. Department of the Air Force*, 38 M.S.P.R. 627, 630, 632 (1988) (in assessing the appellant's medical condition, the opinion of an agency physician who had examined the appellant and who testified at the hearing was entitled to more weight than the conclusory opinion of a private physician, where the private physician did not testify at the hearing, and where his opinion was based on a single examination); *Walls v. U.S. Postal Service*, 10 M.S.P.R. 274, 278 (1982) (the administrative judge should not have given more weight to affidavits than to contradictory live testimony where there was no reason, such as inherent improbability or internal inconsistency, to discount the live testimony).

Accordingly, we reverse the initial decision and sustain the agency's action separating the appellant.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.