



position and attempted to hit her in the face. Appellant stated that as a result of this assault she experienced swelling in her face due to a preexisting skin condition, heightened blood pressure, an asthma attack, depression, anxiety and insomnia.

In a statement received by the Office on December 29, 2006, appellant alleged that in August 2005 Colonel Jones became her supervisor; she had worked as the administrative support assistant for 11 years and worked as a civilian with the Department of Defense for 21 years and she had received annual monetary awards for exceptional performance. She alleged that when Colonel Jones became her supervisor he immediately began to harass her with his intimidation or insults on a daily basis. Colonel Jones would come into her office and stare at her very angrily, but would not say anything. He would accuse her of not doing her work, after he had tasked it to someone else to complete; he would threaten to write her up and make trouble for her, he would sneak up behind her and yell at her, accusing her of stealing out of his office; Colonel Jones would say he was going to make her life a living hell. Appellant also described a specific incident occurred on September 18, 2005 which she stated:

“On or about September 18, 2005 Colonel Jones called me into his office for a meeting. I didn’t feel comfortable being in his office, so I purposely left his door open. I brought paper and pen to take notes, sat down in front of his desk as he sat down behind his desk. He began by saying you are not going to work out in this position. I asked why and he accused me of not being at work when I’m supposed to be there, not at my desk during duty hours and not answering the telephone. I told him that I was tired of him harassing her with all of these false accusations. He told me that he had a witness and he got up and walked out. He was gone a couple of minutes and returned without the witness. I stood up and said I was going to file a complaint against him for his harassing me and that I had had enough. Colonel Jones demanded in a very loud voice, ‘you get that smirk off your face’ and then he reached across his desk and tried to strike me in my face with his hand. At first I was in shock and disbelief. I had never seen an officer act this way. I just remember being so frightened, I ran out of this office, but by then my face had swollen and I was having a panic attack and I didn’t know what to do. I remember Ms. Kristina Thompson (Supervisor, Health Services) ... walking in the office asking me what was wrong with my face. I remembered saying something like, ‘that man is crazy’ and left the office. I was scared to death, I didn’t know what to do or who to talk to. My face was swollen for (3) days.”

Appellant noted that following this incident Colonel Jones demanded that she return to work immediately or he would place her on absent without leave (AWOL) and take her pay until she returned to work.

By letter dated January 24, 2007, the Office advised appellant that she needed to submit additional information in support of her claim. It asked her to describe in detail the employment-related conditions or incidents which she believed contributed to her emotional condition and to provide specific descriptions of all practices, incidents, etc., which she believed affected her condition.

In a January 12, 2006 report, received by the Office on February 26, 2007, Dr. Howard Gould, Board-certified in psychiatry and neurology, stated:

“[Appellant] has been followed in our office since October 2005, for the diagnosis of occupational problems and major depression, single episode, mild. She describes conflict with her boss as a major source of depression. [Appellant] reports the following: depressed mood, crying, irritability and anxiety. Her energy is low, concentration poor and she has insomnia.... Due to the level of [appellant’s] depression she was unable to perform her duties on her job.... [She] is expected to return to work on January 16, 2006.

In a March 1, 2006 report, received by the Office on February 26, 2007, Dr. Reed Pitre, a specialist in psychiatry, stated that he had completed a full psychiatric assessment of appellant. He diagnosed depressive disorder and anxiety disorder, for which she was undergoing daily treatment. Dr. Pitre noted that appellant had not worked since October 2005. Appellant attempted to return to work in January 2006, but experienced an exacerbation of her symptoms and went back on sick leave. Dr. Pitre related that appellant’s anxiety and stress led to significant medical comorbidity with elevated blood pressure and urticaria related to her relationship with her supervisor. He stated that currently appellant’s medical condition prevented her from working due to debilitating panic and anxiety attacks, decreased focus, concentration and memory due to clinical depression and associated insomnia leading to decreased energy, increased irritability and anhedonia. Dr. Pitre noted that it was impossible to accurately estimate when she will achieve partial or full recovery from her depressive and anxiety symptoms, the majority of patients with her symptoms achieved remission of symptoms within approximately four to six weeks.

Appellant submitted statements from several coworkers and family members, which were received by the Office on February 27, 2007. These statements indicated that she had been a stable, well-adjusted individual for many years until recently when she began to experience problems at work which had a deleterious effect on her emotional state and well being. None of these statements, however, contained a statement from someone who witnessed first-hand the alleged September 18, 2005 assault on appellant on the part of Colonel Jones, appellant’s supervisor or witnessed Colonel Jones engaging in harassment or abusive behavior toward appellant.

The employing establishment submitted a copy of a May 25, 2006 memorandum from Melissa Martinez, Esq., of the Judge Advocate General staff, written in response to appellant’s Merit Systems Protection Board [MSPB] grievance. Ms. Martinez noted that appellant had been removed from her position as an administrative support assistant for disciplinary reasons, effective April 27, 2006, by Dr. Vicky Dunn, the employing establishment’s deputy chief of staff and chief personnel director. Dr. Dunn, acting on Colonel Jones’ recommendations, removed appellant from her position on April 12, 2006 on the grounds that she had taken unauthorized AWOL, failed to follow supervisory instructions in requesting leave and failed to follow established leave procedures. She asserted that appellant had taken excessive, often unapproved leave and had left work for protracted periods without providing the required documentation that she had a medical condition which needed treatment; appellant also allegedly failed to follow supervisory instructions from Colonel Jones and other supervisors to provide such support for her absences.

The memorandum also rebutted appellant's account of what transpired between her and Colonel Jones after he became her supervisor. As she indicated, Colonel Jones informed her on September 8, 2005 that he was changing her work schedule from one comprising 10 hours a day, four days a week to one which required her to work a five-day, 8-hour per day, Monday thru Friday schedule. In addition, the memorandum stated that Colonel Jones informed appellant in October 2005 about the procedures for requesting leave in advance, as well as the sanctions she would receive if she failed to follow these procedures. Appellant allegedly disregarded Colonel Jones' instructions and missed substantial periods of work without approved leave from October 2005 until January 17, 2006, when she worked one day, then went AWOL again until the effective date of her removal.<sup>1</sup> Ms. Martinez asserted that, while appellant did submit some medical information during this time, it was insufficient to explain her extended absences from work and failed to address whether or not she was able to continue to work with a reduced schedule and workload.<sup>2</sup>

The employing establishment also submitted a December 12, 2006 statement from Dr. Dunn, who asserted that appellant was the first employee who had spoken negatively about Colonel Jones in the six years she had been professionally associated with him. Dr. Dunn stated that Colonel Jones was "a standout," an understanding and empathetic administrator who had achieved a 30-year record of highly distinguished and impeccable professional service. She asserted that he had demonstrated excellent leadership ability in all of the positions in which he had served, working effectively with people of all ranks and backgrounds, showing unconditional support and fairness to subordinates and superiors and providing sound, practical advice to employees whenever help was required. Dr. Dunn stated that Colonel Jones possessed excellent communication skills and had the ability to advance his point of view and discuss issues in a nonthreatening manner.

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<sup>1</sup> The memorandum notes that, on November 17, 2005, Colonel Jones submitted to appellant a Letter of Direction (LOD) to report to work on November 28, 2005 or provide appropriate medical documentation to support her absence. The LOD was issued to her due to her prolonged unauthorized absence and failure to provide acceptable medical documentation of her medical conditions. Appellant received similar instructions to report to work from Colonel Jones in an e-mail dated December 9, 2005; from Dr. Dunn in a January 5, 2006 e-mail, which emphasized the importance of providing supporting medical information; and from Colonel Hickey, First Army Chief of Staff, in a February 17, 2006 letter, who told appellant that he did not believe it to be harassment for a supervisor to expect an employee to comply with a requirement of the command, the Army or the Federal Government.

<sup>2</sup> The memorandum noted that appellant submitted to Colonel Jones a September 20, 2005 report from Dr. Kenya Anders, Board-certified in internal medicine, who stated that appellant was examined that day for a severe flare-up of her chronic skin condition. Appellant attributed this to the increased stress in her work environment and stated that it would not be wise for her to return to work. Dr. Anders also submitted five "verification of treatment" forms with the following dates: September 20, 2005, which stated was seen for "shortness of breath, blood pressure and hives" and contained a box checked "may resume work"; September 26, 2005, which listed no medical reason for her appointment, but also contained a checked box indicating "may resume work" on September 29, 2005; October 19, 2005, which indicated that appellant was under a physician's care and would be in treatment three days a week for three weeks and contained a checked box indicating that appellant "may resume work" on November 10, 2005; October 18, 2005, which listed no medical reason for her appointment and November 14, 2005, which indicated that she was seen for "stress-related symptoms" and contained a checked box stating "may resume work." Ms. Martinez noted that appellant also submitted the January and March 2006 reports from Drs. Gould and Pitre, but noted that neither of these physicians provided sufficient medical support for appellant's prolonged absences from work. Appellant ultimately settled the MSPB claim by agreement dated October 16, 2006. The agreement restored appellant to her former position and settled the issues regarding leave and pay.

The employing establishment formally controverted appellant's claim by letter to the Office dated February 21, 2007. It rebutted appellant's allegation that Colonel Jones tried to hit her in the face during the counseling session which took place in Colonel Jones' office on September 13, 2005.<sup>3</sup> The Office noted that appellant had submitted no evidence supporting her allegations that an incident of this nature had occurred or that Colonel Jones had assaulted, intimidated, insulted or harassed her. The employing establishment further noted that appellant was resistant to Colonel Jones' decision to change her work schedule. It attached copies of e-mails from appellant in which she stated that the change would interfere with her outside work with a ministry and that in any event she was planning on retiring in six months. The employing establishment further related that, when Colonel Jones met with appellant in his office to discuss and explain the schedule change, she became angry and combative. While Colonel Jones dismissed appellant from his office due to her behavior, he denied that he yelled at her, accused her of stealing or mistreated her or attempted to hit her. The employing establishment then reiterated the contentions made against appellant in the MSPB grievance and noted that it had included a copy of the MSPB settlement agreement, signed on November 15, 2006. The agreement provided that appellant could be reinstated, exhaust her sick leave, apply for early retirement from federal service and receive a \$25,000.00 buyout if she agreed to file for retirement effective August 31, 2006.<sup>4</sup>

The employing establishment submitted statements from three of appellant's coworkers, received by the Office on March 13, 2007. Each of these employees stated that they had been associated with Colonel Jones for several years and attested that he was a highly professional, well-mannered, even-tempered administrator who treated his employees in a fair and reasonable manner.

In a statement dated January 26, 2007, Colonel Jones reiterated the employing establishment's rebuttal of appellant's contentions that he tried to hit or assault her or that he engaged in a pattern of harassment, intimidation or discriminatory behavior toward her. He stated that his initial interactions with appellant were cordial, civil and friendly. The problems began when he sent a September 8, 2005 e-mail directing her to change her work schedule to one based

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<sup>3</sup> The Office noted that September 18, 2005, the date on which appellant alleged that she was assaulted by Colonel Jones, was a Sunday. Appellant, therefore, was not at work on the date of the alleged assault. Nevertheless, both appellant and Colonel Jones stated that a counseling session occurred in September 2005, the tone of which became acrimonious.

<sup>4</sup> The employing establishment also asserted that appellant filed an Equal Employment Opportunity (EEO) claim. It stated that on the basis of his investigation the EEO examiner concluded that there was not a hostile, intimidating or abusive work environment based on the evidence of record and that the preponderance of the evidence failed to show that she was subjected to harassment. However, a copy of this EEO investigation is not included in the instant record.

on an eight-hour, five days per week routine.<sup>5</sup> Colonel Jones felt that his decision to change her hours and her disagreement with that decision was the reason she changed her job performance and attitude, which ultimately resulted in appellant shirking her responsibilities and job duties. He noted that there had been no significant issues with her health, medical state and attitude or job performance prior to that point. Colonel Jones stated that he scheduled a September 13, 2005 counseling session to discuss these issues with appellant; during this meeting he felt her attitude was becoming more combative and argumentative and less receptive to his observations.<sup>6</sup> He denied appellant's allegation that he moved from behind his desk, except to seek an appropriate witness for the remainder of the counseling session. Colonel Jones stated that at no time during this meeting did he raise his voice, use abusive or derogatory language or in any way communicate a threat or attempt to assault or strike her. He noted that there was a coworker sitting right outside his open office door who would have heard him had he engaged in such behavior, in addition to seven other employees in a common, open cubicle area. Lastly, Colonel Jones reiterated previous statements by the employing establishment that appellant stopped coming to work, went AWOL and refused to follow proper procedures for requesting leave after the September 2005 meeting. As a result of these actions he sent appellant a letter of direction to return to work on November 17, 2005.

By decision dated June 27, 2007, the Office denied appellant's claim on the basis that she failed to establish any compensable factor of employment and thus fact of injury was not established.

By letter dated July 16, 2007, appellant requested an oral hearing. On December 5, 2007 the Office sent a notice of hearing to appellant and provided procedural information regarding the hearing. The notice stated that a hearing would be held on January 10, 2008 at 2:15 p.m. Appellant did not appear at the hearing.

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<sup>5</sup> Colonel Jones noted that appellant disagreed with this change and asked him to "rethink it" before changing her hours. He advised that appellant's primary reason for disagreement was because of the work that she did with her private business, which required her to travel on the weekends and left Monday as her only day off each week. Appellant also asserted that her job was scheduled to be abolished within one year and that she was going to retire from federal service. Colonel Jones responded that it could be 8 to 10 months or longer before the job was abolished and she retired. Further, he had concluded based on his observation of activity at the worksite that the hours before 9:00 a.m. and after 4:00 p.m. were extremely unproductive in terms of office functions and that appellant was not performing certain duties outlined in her job description; this was also based on information she provided regarding her daily and weekly tasks. Colonel Jones further stated that he was not insensitive to appellant's concerns. However, as it was her personal choice to have a second job, he could not factor that into decisions about what was best for the office and about what constituted the most appropriate and productive use of her time to meet office and mission requirements. These statements exchanged between Colonel Jones and appellant are documented in e-mails contained in the instant record.

<sup>6</sup> Colonel Jones stated that appellant told him she had been doing this job for a long time and that none of her other bosses had a problem with any of her performance or the way she did her job. When he responded that his expectations might be different from her previous supervisors and that he might have different requirements and interpretations of how the office should run, appellant became insubordinate and disrespectful; she stared out the window and feigned disinterest in my discussion, refusing to engage with me or answer questions. Colonel Jones stated that he ended the meeting by telling her that he was quite surprised by her unreceptive attitude and that her behavior was not what he would have expected from someone with her experience and years of service.

By decision dated January 31, 2008, the Office determined that appellant had abandoned her request for a hearing.

**LEGAL PRECEDENT -- ISSUE 1**

To establish that an emotional condition was sustained in the performance of duty there must be factual evidence identifying and corroborating employment factors or incidents alleged to have caused or contributed to the condition, medical evidence establishing that the employee has an emotional condition and rationalized medical opinion establishing that compensable employment factors are causally related to the claimed emotional condition.<sup>7</sup> There must be evidence that implicated acts of harassment or discrimination did, in fact, occur supported by specific, substantive, reliable and probative evidence.<sup>8</sup>

The first issue to be addressed is whether appellant has established factors of employment that contributed to her alleged emotional condition or disability. Where the disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.<sup>9</sup> On the other hand, disability is not covered where it results from an employee's fear of a reduction-in-force, frustration from not being permitted to work in a particular environment or to hold a particular position, or to secure a promotion. Disabling conditions resulting from an employee's feeling of job insecurity or the desire for a different job do not constitute a personal injury sustained while in the performance of duty within the meaning of the Act.<sup>10</sup>

**ANALYSIS -- ISSUE 1**

The Board finds that appellant has failed to submit sufficient evidence to establish her allegations that her supervisor engaged in a pattern of harassment, intimidation or discrimination. Appellant's assertions that Colonel Jones began mistreating her from the moment he became her supervisor are unsubstantiated. Colonel Jones denied appellant's allegations that she was treated unfairly or subjected her to harassment. Appellant alleged that he gave her unreasonable restrictions, job duties and expectations that had not been imposed by previous supervisors, but failed to submit documentation to support these allegations. She also alleged that Colonel Jones made accusatory statements and engaged in actions which she believed constituted harassment

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<sup>7</sup> See *Debbie J. Hobbs*, 43 ECAB 135 (1991).

<sup>8</sup> See *Ruth C. Borden*, 43 ECAB 146 (1991).

<sup>9</sup> *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>10</sup> *Id.*

and discrimination,<sup>11</sup> but she provided no corroborating evidence or witness statements to establish that the statements actually were made or that the actions actually occurred.

Appellant also alleged that Colonel Jones was hostile to her and spoke to her in a condescending, intimidating, threatening offensive manner at the September 13, 2005 meeting, but did not provide sufficient evidence to establish that she was harassed or treated in a discriminatory manner.<sup>12</sup> Mere perceptions of harassment or discrimination are not compensable; a claimant must establish a basis in fact for the claim by supporting her allegations with probative and reliable evidence.<sup>13</sup> Colonel Jones stated that as part of his managerial functions he had undertaken an efficiency review of the office. Based on his observations, he concluded that appellant's four-day weekly work schedule was geared to her personal interests, *i.e.*, her commitment to her second job with a ministry and was hindering her primary, overriding responsibilities to the employing establishment. Colonel Jones noted that appellant's work habits and work schedule were undermining the overall productivity of the office and that she was not performing certain duties outlined in her job description. He indicated that he scheduled the September 13, 2005 counseling session as a constructive measure with the intent of improving appellant's performance as well as office productivity. Colonel Jones asserted that he changed appellant's schedule because it was in the best interests of the office and further mission requirements; he denied that he had a personal agenda to harass and intimidate appellant or terminate her from her position. While he conceded that the tone of the September 13, 2005 counseling session became tense and discordant, he denied that he intimidated or threatened appellant or behaved in a confrontational manner at the hearing. Disciplinary matters consisting of counseling sessions, discussions or letters of warning for conduct pertain to actions taken in an administrative capacity and are not compensable as factors of employment.<sup>14</sup> Regarding appellant's allegation that Colonel Jones tried to strike her in the face during the September 2005 hearing, she provided no corroborating evidence, such as witness statements, to establish that the alleged assault actually occurred.<sup>15</sup> The Board also notes that her own allegations do not substantiate that Colonel Jones actually struck her face, but that he attempted to do so.

The Office reviewed all of appellant's allegations of harassment, abuse and mistreatment and found that they were not substantiated or corroborated. To that end, the Board finds that the Office properly found that the episodes of harassment cited by appellant did not factually occur

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<sup>11</sup> The Board concludes that appellant's assertion that Colonel Jones' alleged statements that he would "make her life a living hell," that she "did n[o]t know anything," that she "did n[o]t know how to do her work," and that she "would n[o]t win this fight," are not compensable. Although the Board has recognized the compensability of verbal abuse in certain circumstances, this does not imply that every statement uttered in the workplace will give rise to coverage under the Act. *Harriet J. Landry*, 47 ECAB 543, 547 (1996). Appellant has not shown how such isolated comments would rise to the level of verbal abuse or otherwise fall within the coverage of the Act. *Alfred Arts*, 45 ECAB 530, 543-44 (1994).

<sup>12</sup> See *Joel Parker, Sr.*, 43 ECAB 220 (1991) (The Board held that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

<sup>13</sup> *Curtis Hall*, 45 ECAB 316 (1994); *Margaret S. Krzycki*, 43 ECAB 496 (1992).

<sup>14</sup> *Barbara E. Hamm*, 45 ECAB 843 (1994); *Barbara J. Nicholson*, 45 ECAB 803 (1994).

<sup>15</sup> See *Larry J. Thomas*, 44 ECAB 291, 300 (1992).

as alleged by appellant, as she failed to provide any corroborating evidence for her allegations. As such, her allegations constitute mere perceptions or generally stated assertions of dissatisfaction with a certain superior at work which do not support her claim for an emotional disability.<sup>16</sup> For this reason, the Office properly determined that these incidents constituted mere perceptions of appellant and were not factually established. Appellant has not submitted evidence sufficient to establish that Colonel Jones engaged in a pattern of harassment and intimidation toward her or created a hostile workplace environment.

The Board finds the evidence of record does not establish that the administrative and personnel actions taken by management in this case were in error and are, therefore, not considered factors of employment. An employee's emotional reaction to an administrative or personnel matter is not covered under the Act, unless there is evidence that the employing establishment acted unreasonably.<sup>17</sup> Appellant has not presented sufficient evidence that the employing establishment acted unreasonably or committed error with regard to the incidents of alleged unreasonable actions involving personnel matters on the part of the employing establishment.

Appellant alleged that she sustained stress in the performance of her duties due to the additional responsibilities assigned to her by Colonel Jones. The Board has held that emotional reactions to situations in which an employee is trying to meet her position requirements are compensable.<sup>18</sup> However, appellant has not submitted sufficient evidence to support her allegations that Colonel Jones imposed an unusually heavy workload or subjected her to unreasonable demands in setting performance guidelines for her. Assignment of a work schedule is an administrative function and not a work factor and is not compensable absent a showing of error or abuse.

As part of the managerial function, a supervisor must assign work. Appellant did not submit any evidence to substantiate that any of her work assignments were in error or were abusive.

Appellant alleged that Colonel Jones arbitrarily proposed to change her work shift from four days a week, 10 hours a day to five days, 8 hours a day. The Board notes that disability is not covered where it results from such factors as frustration from not being permitted to work in a particular environment or to hold a particular position. While a change in an employee's work shift may under certain circumstances be a factor of employment to be considered in determining if an injury has been sustained in the performance of duty,<sup>19</sup> appellant has not shown that Colonel Jones' proposed change to a five-day weekly schedule constituted error or abuse on the part of the employing establishment.<sup>20</sup> She has not provided sufficient evidence to establish that

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<sup>16</sup> See *Debbie J. Hobbs*, *supra* note 7.

<sup>17</sup> See *Alfred Arts*, *supra* note 11.

<sup>18</sup> See *Lillian Cutler*, *supra* note 9.

<sup>19</sup> See *Gloria Swanson*, 43 ECAB 161, 165-68 (1991); *Charles J. Jenkins*, 40 ECAB 362, 366 (1988).

<sup>20</sup> See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

such action on the part of management was made contrary to the relevant policy; in fact, she conceded in her September 2005 e-mails that Colonel Jones had the authority and the right to change her work schedule. Thus, appellant has not established a compensable employment factor under the Act with respect to the proposed change in work shift.

Regarding appellant's allegation that she developed stress due to the uncertainty of her job duties and her insecurity about maintaining her position, the Board has previously held that a claimant's job insecurity is not a compensable factor of employment under the Act.<sup>21</sup> Accordingly, appellant has presented no evidence that the employing establishment acted unreasonably or committed error with regard to these incidents of administrative managerial functions. A reaction to such factors did not constitute an injury arising within the performance of duty; such personnel matters were not compensable factors of employment in the absence of agency error or abuse.

The Board notes that matters pertaining to use of leave are generally not covered under the Act as they pertain to administrative actions of the employing establishment and not to the regular or specially assigned duties the employee was hired to perform.<sup>22</sup> However, error or abuse by the employing establishment in an administrative or personnel matter, or evidence that the employing establishment acted unreasonably in the administrative or personnel matter, may afford coverage.<sup>23</sup> Colonel Jones indicated that he acted in his administrative capacity in rejecting appellant's leave requests because her attendance was unsatisfactory and because she disregarded administrative procedures in requesting leave. He rejected appellant's allegation that he harassed her by arbitrarily denying her requests for leave. As appellant has failed to show that these actions demonstrated error or abuse on the part of management, they are not compensable.

Appellant has failed to establish error or abuse with regard to her allegation that the employing establishment acted improperly in issuing her letters of warning. Her complaints that she was treated unfairly by management were rebutted by the employing establishment, which provided documentation that management informally warned appellant four times between November 2005 and March 2006 regarding her prolonged absences from the office. Further, the Board rejects appellant's assertion that Colonel Jones acted improperly in calling her at home and demanding that she return to work immediately or he would charge her with being AWOL. Colonel Jones was acting within his administrative capacity in admonishing an employee for her continued, unexplained absence from work and in attempting to bring about her return to work. As appellant has failed to show that these actions demonstrated error or abuse on the part of management, they are not compensable.<sup>24</sup>

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<sup>21</sup> See *Artice Dotson*, 42 ECAB 754, 758 (1990); *Allen C. Godfrey*, 37 ECAB 334, 337-38 (1986).

<sup>22</sup> *Elizabeth Pinero*, 46 ECAB 123 (1994).

<sup>23</sup> *Margreate Lublin*, 44 ECAB 945 (1993).

<sup>24</sup> The Board notes that appellant's MSPB grievance was settled by agreement dated November 15, 2006. As stated above, the terms of the agreement allowed for appellant's reinstatement and afforded her an opportunity to exhaust sick leave, apply for early retirement and receive a buyout if retired effective August 31, 2006. However, the mere fact that personnel actions were later modified or rescinded, does not in and of itself, establish error or abuse. *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

The Board has held that investigations, which are an administrative function of the employing establishment, that do not involve an employee's regularly or specially assigned employment duties are not considered to be employment factors.<sup>25</sup> However, the Board has also found that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. Although appellant has made allegations that the employing establishment erred and acted abusively in conducting its investigation of her work and leave status from September 2005 to April 2006, she has not provided sufficient evidence to support such a claim. A review of the evidence indicates that appellant has not shown that the employing establishment's actions in connection with its investigation of her were unreasonable. Thus, she has not established a compensable employment factor under the Act in this respect.

The Board finds that appellant has not established a compensable work factor. For this reason, the medical evidence will not be considered.<sup>26</sup> The Board will affirm the June 27, 2007 decision denying compensation for an alleged emotional condition.

### **LEGAL PRECEDENT -- ISSUE 2**

With respect to abandonment of hearing requests, Chapter 2.1601.6.e of the Office's procedure manual provides in relevant part:

“(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.

“Under these circumstances, [the Branch of Hearings and Review] will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the [district Office]. In cases involving precoupment hearings, [the Branch of Hearings and Review] will also issue a final decision on the overpayment, based on the available evidence, before returning the case to the [district Office].

“(2) However, in any case where a request for postponement has been received, regardless of any failure to appear for the hearing, [the Branch of Hearings and Review] should advise the claimant that such a request has the effect of converting the format from an oral hearing to a review of the written record.

“This course of action is correct even if [the Branch of Hearings and Review] can advise the claimant far enough in advance of the hearing that the request is not

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<sup>25</sup> *Jimmy B. Copeland*, 43 ECAB 339, 345 (1991).

<sup>26</sup> *See Margaret S. Krzycki*, 43 ECAB 496 (1992).

approved and that the claimant is, therefore, expected to attend the hearing and the claimant does not attend.”<sup>27</sup>

### **ANALYSIS -- ISSUE 2**

In finding that appellant abandoned her July 16, 2007 request for a hearing, the Office noted that a hearing had been scheduled in Atlanta, Georgia on January 10, 2008, that she received written notification of the hearing 30 days in advance, that she failed to appear and that the record contained no evidence that she contacted the Office to explain her failure to attend the hearing. On appeal, appellant asserts that she appeared outside the hearing room on January 10, 2008 but was unable to proceed with the hearing because she was experiencing a panic attack. She contends that she submitted a document to a clerk outside the hearing room indicating that she was ill and unable to attend the hearing. Appellant stated that she “assumed” that the hearing would be rescheduled because, allegedly, the hearing examiner told her subsequently that a court reporter was not present, that she had to leave to preside over another hearing and because she informed the hearing examiner that she was too ill to attend the hearing. However, she has provided no evidence or documentation to support these assertions.<sup>28</sup>

Based on the evidence of the record, appellant did not request postponement of the hearing date, failed to appear at the scheduled hearing and failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. As this meets the criteria for abandonment as specified in Chapter 2.1601.6.e of the Office’s procedure manual, the Office properly found that appellant abandoned her request for an oral hearing before an Office hearing representative.

### **CONCLUSION**

The Board finds that appellant failed to meet her burden of proof to establish that she sustained an emotional condition in the performance of duty. The Board finds that the Office properly determined that appellant abandoned her request for a hearing.

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<sup>27</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6.e (January 1999).

<sup>28</sup> The Board notes that appellant would have been required to submit written confirmation from the hearing examiner that she had provided a reasonable excuse for not attending her scheduled hearing.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 31, 2008 and June 27, 2007 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: May 19, 2009  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board