

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**P.H., Appellant**

**and**

**DEPARTMENT OF JUSTICE, BUREAU OF  
PRISONS, Elkton, OH, Employer**

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**Docket No. 14-323  
Issued: June 4, 2014**

*Appearances:*

*Robert Hoskinson, for the appellant*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On November 26, 2013 appellant, through his attorney, filed a timely appeal from a November 6, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant established an emotional condition in the performance of duty.

**FACTUAL HISTORY**

On September 13, 2012 appellant, then a 47-year-old gardener worker supervisor, filed an occupational disease claim (Form CA-2) alleging stress and anxiety. He stated that his condition resulted from the employing establishment's decision to abolish a second gardener

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

worker supervisor position, unrealistic work completion expectations and overly critical work evaluations. Appellant first became aware of the condition on October 20, 2011 and of its relationship to his employment on August 9, 2012. A supervisor noted that appellant had not stopped work or not discussed the matter with him prior to September 13, 2012.

In a statement dated September 5, 2012, appellant described his work duties and the factors alleged to cause his emotional condition. On December 31, 2010 the second gardener worker supervisor retired and appellant began keeping a journal of his daily activities due to concerns about increasing expectations of work. On January 23, 2012 appellant received an outstanding rating for directing work; but one month later, he was given a “memorandum of expectations” regarding his duties that no other employee received. Over two months later, after a formal grievance process, the other staff members were issued memoranda of expectations. On April 3, 2012 the employing establishment issued a memorandum regarding mowing procedures, which directed appellant to supervise inmates mowing grass and restricted the resources available to him for completing work. Appellant characterized the memorandum as “micro-managing.” While he was away for two weeks in July 2012, his responsibilities were left unattended and the grass and weeds had grown around the employing establishment in various locations, including a firing range. When appellant returned on July 9, 2012 his supervisors ordered him to complete work at the firing range that day, which he stated was an unreasonable time frame. He alleged that his supervisors continued to harass and coerce him that week, which resulted in stress. Appellant stated that his supervisors’ behavior that week violated the collective bargaining agreement. On August 9, 2012 he began visiting a counselor for his stress and anxiety. Appellant asserted that he should be compensated for the sick leave used to travel to a counselor and for his medical expenses. He attached a performance review from 2011, which contained no evaluation less than “excellent” and several “outstanding” evaluations.

In a memorandum dated February 23, 2012, appellant’s supervisor described expectations for appellant’s work. He stated that appellant should ensure that the federal correctional institution (FCI) front entrance had been cleaned daily, which included picking up trash, ensuring white rocks did not mix with red rocks and checking for problems in grassy areas. The memorandum noted that appellant should make rounds in front of the FCI and a satellite prison camp several times daily to ensure that inmates were cleaning sidewalks and rock areas. Appellant should ensure that his crew pressure washed the control center window at least once a week and check the window daily. The memorandum noted that he should ensure that all signage was properly straightened and secured; that the area outside the facility was kept clean of refuse; that a stockpile of firewood was kept for the religious services department; and that all other landscaping duties such as mowing, snow removal and perimeter road maintenance were performed. In a memorandum dated April 3, 2012, appellant’s supervisor described the procedures for mowing areas around the penitentiary.

Appellant submitted documents from a licensed professional clinical counselor dated August 9 and December 20, 2012.

By letter dated November 1, 2012, OWCP requested additional factual and medical evidence from appellant. It afforded him 30 days to submit this additional evidence.

In response, appellant submitted documents related to a labor-management grievance process. In a memorandum dated June 12, 2012, he requested information regarding the staffing of the vacant gardener worker supervisor position. On July 3, 2012 the employing establishment denied appellant's request for a declaration of its intentions regarding staffing of the two gardener supervisor positions and a vacant landscaper position. On July 12, 2012 appellant contacted the warden regarding the work left undone during the weeks of June 24 and July 1, 2012 and his supervisors' insistence that he complete part of it in one shift. On July 31, 2012 the warden advised appellant that he failed to provide specific instances of how he had not been treated fairly and equitably; that his supervisor assigned the level of priority and deadlines to tasks he needed accomplished; and that the tasks he had been assigned were within the scope of his duties as a gardener supervisor. Appellant also submitted minutes from a union meeting dated July 25, 2012, which contained a discussion of the request for a plan of action for distribution of the work formerly belonging to a landscape supervisor position. He submitted a formal grievance form dated August 9, 2012. In a memorandum dated September 25, 2012, appellant submitted an invocation of arbitration regarding the vacant second gardener worker supervisor position.

On November 28, 2012 appellant responded to OWCP's inquiries. He noted that he had filed two formal grievances relating to his claim. One of the grievances was a "union animus" grievance, which appellant understood to be resolved by the retraction of the February 23, 2012 memorandum of expectations and of which he had not been formally notified. The second was a vacant position grievance that was currently pending arbitration. Appellant stated that he did not attribute his emotional condition to any situations outside of his federal employment that could result in unusual levels of stress or anxiety. He noted that he did not abuse any substances or have major problems in his personal life, such as issues in his marriage or death or illness of a family member. Appellant listed hobbies such as fishing, watching football and spending time with his family. He first noticed his condition on or about October 20, 2011, with symptoms of anger, depression, frustration and agitation. Appellant felt as though he was constantly being harassed by his supervisor due to unreasonable expectations and scrutiny that were considered to be part of his area of responsibility. He was being expected or required to perform work unrelated to his position description and that his supervisors demanded that he "multi-task" in order to perform work in multiple areas. Appellant stated that the clinical counseling helped him and that he had seen a psychiatrist for one session, but that it was too early to describe any benefit from the visit. He noted that he had never previously been diagnosed with or hospitalized for an emotional condition; had never been under the care of a psychiatrist, psychologist or counselor; and had never taken medication for an emotional condition.

In a statement dated September 5, 2012, Jerry Toomey, appellant's former supervisor at the employing establishment, stated that from 2002 through 2005 he supervised appellant and he was an outstanding employee. He was aware of statements made regarding appellant that were inappropriate, such as a plan between a facilities manager and the warden to encourage him to apply for another position so that they could fire him during the probationary period. Mr. Toomey asserted that he had been encouraged by the management of the employing establishment to harass, intimidate or coerce appellant regarding his working conditions and daily performance.

In a statement dated December 9, 2012, Brian Weaver, a former general foreman at the employing establishment, stated that from 1997 through 2006 he worked with appellant. He noted several incidents relating to inappropriate or unfair treatment of appellant by management, with the most recent cited example in May 2006. Mr. Weaver alleged that management had encouraged him to change appellant's "outstanding" performance rating and that he thought this was wrong. He stated that he had witnessed abuse of power against appellant based on an executive staff member's dislike of appellant due to his union activity.

By decision dated April 12, 2013, OWCP denied appellant's claim. It found that he had not established that the alleged work incidents had occurred, with corroboration from witnesses or documentary evidence. OWCP noted that the statements of Mr. Toomey and Mr. Weaver referenced a period of time prior to the time frame presented in the claim concerning the alleged incidents of harassment and unrealistic work expectations and were therefore of little probative value.

On April 25, 2013 appellant requested an oral hearing before an OWCP hearing representative.

A hearing was held on August 13, 2013. At the hearing, appellant stated that he had presented evidence suggesting a pattern of harassment by management based on his union activity. He acknowledged that hard evidence was lacking, but noted that the connection remained. Appellant recalled that, when the employing establishment upgraded the security of a minimum security camp, a second gardener worker supervisor was hired and that he had moved inside the facility at that time. When the second gardener worker supervisor retired, appellant returned to his duties outside the facility. When a change in management occurred, the employing establishment asked him to perform duties inside the facility as well. Appellant alleged heavy oversight of his duties and did not understand why a memorandum of expectations was necessary. He did not have enough inmates to do his job properly and became agitated when asked to complete gardening work left undone during an absence in July 2012. Appellant noted that he could provide a third person's testimony regarding management's retaliation against him for union activities. He also noted that he worked in a mechanical room without heat or air conditioning, but acknowledged that this was the same office space used by the manager whom he replaced and not a special arrangement for him alone. The hearing representative left the record open for 30 days for appellant to submit additional evidence in support of his claim.

In a report dated December 10, 2012, Dr. Nabila Sargious, a Board-certified psychiatrist, diagnosed appellant with anxiety disorder and alcohol abuse/dependency. She stated that he needed documentation and had increased anxiety about his supervisor. In a report dated January 17, 2013, Dr. Sargious stated that appellant was preoccupied with issues at work and believed that his supervisors were attempting to fire him. She stated that he had difficulty going to work due to fears of comments by his supervisor. Dr. Sargious did not prescribe medication but recommended therapy.

On September 11, 2013 appellant's supervisor responded to several statements made at the hearing. He stated that the memorandum of expectations was created because appellant had been reluctant to perform duties as assigned and had requested an outline of his responsibilities. Appellant's supervisor noted that other employees were shortly issued similar memoranda and

that appellant's performance had been consistently rated at the "exceeds" level for the past five years. Appellant had been tasked with the duties of the abolished gardener supervisor position, which was maintaining the grounds outside of the facility and also an area inside the facility requiring approximately two hours of labor per week. Appellant's supervisor noted that other employees had assumed the primary responsibilities of maintaining the grounds inside the facilities and that appellant was performing similar tasks to the abolished position. If appellant was not available to perform his duties, the task was assigned to another employee. Appellant's supervisor stated that other employees would watch over appellant's work details when he was not available and that he was expected to fill in for other employees for similar reasons.

By decision dated November 6, 2013, the hearing representative affirmed OWCP's April 12, 2013 decision, finding that appellant did not establish any compensable work factors. He found that appellant substantiated that the second gardener worker supervisor position had not been refilled, but it was not a compensable work factor.

### **LEGAL PRECEDENT**

To establish a claim that he or she sustained an emotional condition in the performance of duty, an employee must submit the following: (1) medical evidence establishing that he or she has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his or her condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.<sup>2</sup>

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment.<sup>3</sup> There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation.<sup>4</sup> Where the disability results from an employee's emotional reaction to his or her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.<sup>5</sup> On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or his or her frustration from not being permitted to work in a particular environment or to hold a particular position.<sup>6</sup>

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under FECA.<sup>7</sup> However, the Board

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<sup>2</sup> V.W., 58 ECAB 428, 431 (2007); *Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1990).

<sup>3</sup> L.D., 58 ECAB 344, 350 n.8 (2007); *Robert Breeden*, 57 ECAB 622, 625 (2006).

<sup>4</sup> A.K., 58 ECAB 119, 121 (2006); *David Apgar*, 57 ECAB 137, 140 (2005).

<sup>5</sup> 5 U.S.C. §§ 8101-8193; *Trudy A. Scott*, 52 ECAB 309, 314 (2001); *Lillian Cutler*, 28 ECAB 125, 129 (1976).

<sup>6</sup> J.F., 59 ECAB 331, 338 (2008); *Gregorio E. Conde*, 52 ECAB 410, 411-12 (2001).

<sup>7</sup> See *Matilda R. Wyatt*, 52 ECAB 421, 423 (2001); *Thomas D. McEuen*, 41 ECAB 387, 391-92 (1990).

has held that, where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.<sup>8</sup> In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.<sup>9</sup>

The Board has held that the manner in which a supervisor exercises his or her discretion falls outside the coverage of FECA. This principle recognizes that a supervisor or manager must be allowed to perform their duties and that employee's will, at times, disagree with actions taken. Mere disagreement with or dislike of actions taken by a supervisor or manager will not be compensable absent evidence establishing error or abuse.<sup>10</sup> Although the handling of leave requests and attendance matters are generally related to employment, they are administrative matters and not a duty of the employee.<sup>11</sup>

For harassment or discrimination to give rise to a compensable disability, there must be evidence which establishes that the acts alleged or implicated by the employee did, in fact, occur.<sup>12</sup> Mere perceptions of harassment or discrimination are not compensable under FECA.<sup>13</sup> A claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence.<sup>14</sup> Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.<sup>15</sup> A claimant must establish a factual basis for his or her allegations of harassment or discrimination with probative and reliable evidence.<sup>16</sup>

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, OWCP, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.<sup>17</sup> If a claimant does implicate a factor of

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<sup>8</sup> See *William H. Fortner*, 49 ECAB 324, 325 (1998).

<sup>9</sup> *Ruth S. Johnson*, 46 ECAB 237, 241 (1994).

<sup>10</sup> *S.M.*, Docket No. 09-2290 (issued July 12, 2010); *Linda J. Edwards-Delgado*, 55 ECAB 401, 405 (2004).

<sup>11</sup> *C.T.*, Docket No. 08-2160 (issued May 7, 2009); *Jeral R. Gray*, 57 ECAB 611, 615-16 (2006).

<sup>12</sup> *K.W.*, 59 ECAB 271, 276 (2007); *Robert Breeden*, *supra* note 3.

<sup>13</sup> *M.D.*, 59 ECAB 211, 216-17 (2007); *Robert G. Burns*, 57 ECAB 657, 661 n.14 (2006).

<sup>14</sup> *J.F.*, 59 ECAB 331, 339 (2008); *Robert Breeden*, *supra* note 3.

<sup>15</sup> *G.S.*, Docket No. 09-764 (issued December 18, 2009); *Ronald K. Jablanski*, 56 ECAB 616, 620 (2005); *Penelope C. Owens*, 54 ECAB 684, 686 (2003).

<sup>16</sup> *Robert Breeden*; *supra* note 3; *Beverly R. Jones*, 55 ECAB 411, 416 (2004).

<sup>17</sup> *D.L.*, 58 ECAB 217, 220 (2006); *Jeral R. Gray*, *supra* note 11.

employment, OWCP should then determine whether the evidence of record substantiates that factor.<sup>18</sup> When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, OWCP must base its decision on an analysis of the medical evidence.<sup>19</sup>

### ANALYSIS

The Board finds that appellant has not established that his emotional condition is related to his regular duties as a gardener worker supervisor or his scheduled tour of duty. His allegations do not relate to such factors as overwork or his inability to perform the duties required in his position under *Cutler*.<sup>20</sup> Rather, appellant attributed his emotional reaction to actions taken by his supervisors and management.<sup>21</sup> These actions normally fall outside the scope of FECA absent evidence establishing error or abuse.<sup>22</sup> Appellant rather alleged that the condition resulted from actions of his supervisors. The Board must initially review whether these alleged incidents and conditions of employment are compensable factors of employment under the terms of FECA.

Appellant alleged that he was issued a memorandum of expectations on February 23, 2012 and that he was the only staff member initially issued such a memorandum. He alleged that he had been issued a memorandum concerning mowing procedures on April 3, 2012, which appellant cited as an example of “micro-managing.” Appellant submitted the memoranda to OWCP. He generally alleged that he was unreasonably required to perform the duties of a second gardener worker supervisor. The Board finds that appellant received memoranda on February 23 and April 3, 2012 and was required to perform the duties of a gardener worker supervisor, but has not established that these actions constituted error or abuse. An employee’s reaction to an administrative or personnel matter is not covered under FECA, unless there is evidence that the supervisor or manager acted unreasonably.<sup>23</sup> Appellant has not presented sufficient evidence that his supervisor acted unreasonably or engaged in error or abuse. There is no evidence demonstrating that he was disciplined due to any failure to meet expectations or

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<sup>18</sup> *K.W.*, 59 ECAB 271, 277 (2007); *David C. Lindsey, Jr.*, 56 ECAB 263, 269 (2005).

<sup>19</sup> *Robert Breeden*, *supra* note 3.

<sup>20</sup> *Cutler*, *supra* note 5.

<sup>21</sup> See *Reco Roncaglione*, 52 ECAB 454 (2001) (disagreement with the associate warden held not compensable, whether viewed as a disagreement with supervisory instructions or as perceived poor management); *Robert Knoke*, 51 ECAB 319 (2000) (where the employee attributed his emotional injury to the manner in which his supervisor spoke to him about undelivered mail, the Board found that a reaction to the instruction itself was not compensable, as work assignments given by supervisors in the exercise of supervisory discretion are actions taken in an administrative capacity and, as such, are outside the coverage of FECA); *Frank A. Catapano*, 46 ECAB 297 (1994) (supervisory instructions, with which the employee disagreed, held not compensable in the absence of evidence of managerial error or abuse); *Rudy Madril*, 45 ECAB 602 (1994) (where the employee questioned his supervisor’s instructions to move from belt number five to belt number six and unload mail and became upset because he felt he was being pushed and picked on, the Board found that the incident was not a compensable factor of employment).

<sup>22</sup> *Spur* note 4.

<sup>23</sup> See *Alfred Arts*, 45 ECAB 530, 542 (1994).

received a poor performance rating and there is no evidence demonstrating that his assigned duties were unreasonable. There were no formal factual findings from a union grievance process submitted to the record nor admissions by appellant's superiors, that they had abused their authority in administering work assignments or making hiring decisions. The employing establishment noted that it had issued appellant a memoranda of expectations in its statement dated September 11, 2013, but explained that it had been provided due to his reluctance to perform duties as assigned and his request to outline his responsibilities. Similar memoranda were issued to other staff shortly afterward. Appellant assumed the duties of the abolished gardener worker supervisor position and that other employees had assumed most of the responsibilities of that position while the former gardener worker supervisor remained on staff. There is no evidence of record establishing that requiring him to perform the duties of the former gardener worker supervisor or leaving that position unfilled, was in error or an abuse of discretion. While appellant established that the employing establishment issued memoranda and required him to perform the duties of a former gardener worker supervisor, he has failed to establish a compensable work factor.<sup>24</sup>

Appellant has also alleged that actions by his supervisors constituted harassment. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. A claimant must establish a factual basis for his or her allegations with probative and reliable evidence.<sup>25</sup> Grievances and Equal Employment Opportunity complaints, without findings of fact, do not establish that workplace harassment or unfair treatment occurred.<sup>26</sup> Appellant alleged that he was the subject of unrealistic work expectations on July 9, 2012, after he had been absent for a period of two weeks and his duties had gone unfulfilled. There was no evidence of record from any witness substantiating his contention that he was harassed by his supervisors during the relevant time period.

The evidence appellant submitted in support of his allegations consisted of statements by former supervisors. However, the statements of Mr. Toomey and Mr. Weaver dealt with events occurring only up to 2006 and only vaguely referenced attempts at retaliation without verifiable particulars. Moreover, they did not reference appellant's contention of unrealistic work expectations. Appellant further alleged that his performance ratings had been adversely changed based on personal animus or union activities and the statements of Mr. Toomey and Mr. Weaver contended that management had colluded to encourage his supervisors to lower his performance ratings. However, the employing establishment noted, without contradiction in the record, that appellant's performance rating has been consistently rated at the "exceeds" level for the past five years and he had not been recently lowered below the exceeds level. Thus, appellant has not submitted evidence to substantiate that the event of July 9, 2012 occurred as alleged or that his performance ratings had been adversely and unreasonably changed.

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<sup>24</sup> As appellant has failed to establish a compensable employment factor, the Board need not address the medical evidence of record. *Marlon Vera*, 54 ECAB 834, 839 n.22 (2003).

<sup>25</sup> See *Dennis J. Balogh*, 52 ECAB 232, 236 n.12 (2001).

<sup>26</sup> See *Parley A. Clement*, 48 ECAB 302, 304 (1997).



Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

**CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish that he sustained an emotional condition in the performance of duty.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 6, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 4, 2014  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

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