

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of WALTER T. PENNINGTON and U.S. POSTAL SERVICE,  
MAIN STREET POST OFFICE, Biloxi, MS

*Docket No. 00-2768; Submitted on the Record;  
Issued October 10, 2001*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion under section 8128(a) of the Federal Employees' Compensation Act by denying appellant's request for a merit review.

On December 31, 1997 appellant, then a 52-year-old customer service supervisor, filed a notice of occupational disease alleging that he sustained major depression and anxiety in the performance of duty on or before August 22, 1997, the day he stopped work.<sup>1</sup> In associated statements, appellant attributed his condition to a July 12, 1997 demand letter<sup>2</sup> issued by his supervisor, Michael Bertucci, holding appellant responsible for a \$3,436.23 shortage of stamps in the account of one of his subordinates, Linda Huggard. While appellant admitted that he was in "error in not counting Ms. Huggard in a timely manner," he asserted that the demand letter was abusive, erroneous and "harassment,"<sup>3</sup> according to employing establishment policies against

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<sup>1</sup> The record indicates that appellant retired an Office of Personnel Management (OPM) disability retirement sometime between September 1997 and January 1999.

<sup>2</sup> In documents dated July 12, 1997, the employing establishment demanded that appellant pay the \$3,463.23 shortage, as he "failed to exercise reasonable care in the performance of [his] duties in failing to audit the fixed credits of Linda Huggard in a timely manner which resulted in a flexible credit shortage amounting to \$3,463.23."

<sup>3</sup> On July 24, 1997 appellant filed Equal Employment Opportunity (EEO) grievances alleging that the July 12, 1997 demand letter constituted discrimination and harassment based on age and mental disability. The record contains an August 10, 1998 settlement agreement, in which the employing establishment agreed to pay appellant \$1,500.00 in exchange for appellant withdrawing all EEO complaints. The agreement specifies that the settlement agreement "should not be construed as an admission of discrimination or wrongdoing" by the employing establishment.

holding supervisors responsible for employee stamp stock shortages.<sup>4</sup> Appellant also attributed his condition to having his days off and work hours changed on August 16, 1997, a November 20, 1997 letter of proposed removal for nonfeasance and failure to follow instructions,<sup>5</sup> and denial of a fiscal year 1997 bonus paid to other managers. Appellant characterized the schedule change, proposed removal and denial of the bonus as “harassment.”

In a January 7, 1998 letter, Mr. Bertucci noted that on July 12, 1997, appellant reacted calmly to receiving the demand letter, and asked for assistance in setting up a payment plan. Mr. Bertucci also recalled that appellant accused Ms. Huggard of stealing stamps, while Ms. Huggard accused appellant of unwanted advances toward her. Mr. Bertucci stated that on three occasions prior to July 12, 1997, appellant misrepresented that he had performed all assigned credit checks “current and within time limits.” When research revealed significant discrepancies, appellant did not have an adequate explanation for his failure to monitor postal funds as his position required.

By decision dated March 9, 1998, the Office denied appellant’s claim on the grounds that he failed to establish a compensable factor of employment.

Appellant disagreed with this decision and in an April 5, 1998 letter, requested an oral hearing before a representative of the Office’s Branch of Hearings and Review. At the January 20, 1999 hearing, appellant alleged that he experienced discrimination, was denied promotional opportunities and forced to do widely varying jobs while assigned to Gulfport as he was from Biloxi and there was a traditional rivalry between the two cities. He alleged that he was singled out from other supervisors who were similarly lax in auditing employee shortages, and that he removed Ms. Huggard from window service duties in January 1997, six months prior to the demand letter, due to her chronic shortages. Appellant asserted that a reaudit he requested was not performed. Appellant read into the record portions of a September 16, 1987 employing establishment memorandum suggesting that supervisors should not be held personally responsible for employee stock shortages if the supervisor was not in collusion with the employee or otherwise personally responsible, although each incident should be handled on an individual basis. He therefore asserted that the July 12, 1997 demand letter was issued in error.

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<sup>4</sup> Appellant submitted a December 4, 1985 national employing establishment memorandum, stating that it was “the policy of the Postal Service not to hold supervisors and postmasters personally accountable for employee shortages, if they do not have direct responsibility for the shortage,” although this did “not relieve management’s responsibility for auditing and supervising credits assigned to employees....”

<sup>5</sup> In a November 20, 1997 letter, the employing establishment advised appellant that it proposed to remove him from the postal service for failing to follow instructions on July 9, 1997 regarding accompanying Ms. Huggard to her duty stations to audit her stamp records, and for failing to “perform timely audits of Linda Huggard’s stamp accountability” without adequate explanation. In response to the proposed removal, appellant asserted that he attempted to have Ms. Huggard accompany him to her three duty stations in a postal vehicle as he was instructed, but that Ms. Huggard made obscene comments and refused to accompany him. Appellant also alleged that he had requested a reaudit of Ms. Huggard’s accounts in January 1997 after his accounting showed her \$1,200.00 short, but that this was not performed. In a February 17, 1998 letter, the employing establishment reduced the notice of proposed removal to a letter of warning in lieu of a 14-day suspension, as his work record had been discipline free until the current matter.

In a February 19, 1999 response to the hearing transcript, the employing establishment denied appellant's allegations of abuse, discrimination, and unfair treatment. The employing establishment asserted that the letter of demand and proposed termination were commensurate with the facts of appellant's case, including the inconsistent versions of events he provided to investigators and his superiors regarding his dealings with Ms. Huggard.

The employing establishment submitted accounting records showing that appellant was chronically late in preparing Ms. Huggard's accounts from April 1995 through 1997, and that appellant took no disciplinary action against Ms. Huggard although each accounting showed significant shortfalls or discrepancies in stamp sales.

In a March 8, 1999 letter, appellant again asserted that the July 12, 1997 demand letter was not in accordance with employing establishment policies and therefore was issued in error.

By decision dated April 13, 1999 and finalized April 14, 1999, the Office hearing representative affirmed the Office's March 9, 1998 decision, finding that appellant had failed to allege a compensable factor of employment. The hearing representative found that the demand letter and proposed termination of employment were administrative, disciplinary matters not within the performance of duty, and that no error or abuse was shown. The hearing representative further found that appellant had not submitted any evidence showing that his job assignments prior to 1997 were "in any way erroneous," or that he was "treated differently" due to being from Gulfport.

Appellant disagreed with this decision and in an April 13, 2000 letter requested reconsideration through his attorney. He asserted that "the Hearing Representative erred in determining that the issuance of the demand letter on July 12, 1997 did not constitute abuse or error" by the employing establishment. Appellant submitted a September 16, 1987 employing establishment national memorandum regarding letters of demand, noting that the employing establishment would "not normally hold postmasters and supervisors personally accountable for employee shortages if they do not have direct access to the credit or are not involved in collusion with the employee." The memorandum suggests considering "counseling or discipline" rather than issuing a letter of demand, but concludes that the "action warranted should be determined on a case-by-case basis depending upon the particular circumstances."

By decision dated July 10, 2000, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted in support thereof was of a repetitious and immaterial nature. The Office found that the contents of the September 16, 1987 employing establishment memorandum regarding the accountability of supervisors for employee shortages, and appellant's attorney's contentions of error or abuse, were "merely a restatement of evidence that was previously considered by the Hearing Representative."

The Board finds that the Office in its July 10, 2000 decision properly denied appellant's request for reconsideration on its merits under 5 U.S.C. § 8128(a) on the basis that his request for reconsideration did not meet the requirements set forth under section 8128.<sup>6</sup>

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<sup>6</sup> See 20 C.F.R. § 10.606(b)(2)(i-iii).

Under section 8128(a) of the Federal Employees' Compensation Act,<sup>7</sup> the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,<sup>8</sup> which provides that a claimant may obtain review of the merits if his written application for reconsideration, including all supporting documents, set forth arguments and contain evidence that:

“(i) Shows that [the Office] erroneously applied or interpreted a point of law; or

“(ii) Advances a relevant legal argument not previously considered by the [Office]; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by the [the Office].”<sup>9</sup>

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.<sup>10</sup>

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.<sup>11</sup> As appellant filed her appeal with the Board on September 5, 2000, the only decision properly before the Board is the July 10, 2000 decision denying appellant's request for a merit review.

In support of his April 13, 2000 request for reconsideration, appellant submitted arguments and the September 16, 1987 employing establishment memorandum.

Appellant's April 13, 2000 letter merely reiterates his assertion that the July 12, 1997 demand letter constituted error or abuse by the employing establishment. He made this same argument in statements associated with his December 31, 1997 claim form. Also, appellant offered the same argument at the January 20, 1999 hearing. Thus, the April 13, 2000 letter does not advance a new, relevant legal argument, or establish legal error by the Office.

The September 16, 1987 employing establishment memorandum notes that the employing establishment would “not normally hold postmasters and supervisors personally accountable for employee shortages if they do not have direct access to the credit or are not involved in collusion with the employee.” Appellant read significant portions of this memorandum into the record at the January 20, 1999 hearing. Therefore, the submission of the

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<sup>7</sup> 5 U.S.C. § 8128(a).

<sup>8</sup> 20 C.F.R. § 10.606(b)(1999).

<sup>9</sup> 20 C.F.R. § 10.606(b).

<sup>10</sup> 20 C.F.R. § 10.608(b).

<sup>11</sup> 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

same September 16, 1987 memorandum in support of appellant's request for reconsideration is merely repetitive of identical evidence previously of record and does not fulfill any of the above criteria for the granting of a merit review.

Consequently, the Office's July 10, 2000 decision denying appellant's April 13, 2000 request for reconsideration was proper under the law and acts of the case.

The decision of the Office of Workers' Compensation Programs dated July 10, 2000 is hereby affirmed.

Dated, Washington, DC  
October 10, 2001

Willie T.C. Thomas  
Member

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member