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

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| **TERESA A. WRIGHT, Appellant** | ) | |
| **and** | ) | **Docket No. 04-935** |
| | ) | **Issued: August 18, 2004** |
| **DEPARTMENT OF THE AIR FORCE, LUKE AIR FORCE BASE, AZ, Employer** | ) | |

*Appearances:*
*Teresa A. Wright, pro se*
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

### ***JURISDICTION***

On February 27, 2004 appellant filed a timely appeal of a February 10, 2004 nonmerit decision of the Office of Workers' Compensation Programs which denied her request for reconsideration. She also timely appealed a December 30, 2003 merit decision denying her claim for an employment-related emotional condition. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of appellant's claim.

### ***ISSUES***

The issues on appeal are: (1) whether appellant established that she sustained an emotional condition in the performance of duty; and (2) whether the Office properly denied appellant's request for reconsideration of her claim pursuant to 5 U.S.C. § 8128(a).

### ***FACTUAL HISTORY***

On November 27, 2002 appellant, then a 45-year-old environmental specialist, filed an occupational disease claim for an emotional condition attributed to a difficult work environment and sexual harassment. She first became aware of her condition on June 9, 2002 and realized

that it was caused or contributed to by her employment on August 25, 2002. Appellant stopped work approximately October 1, 2002 and returned to duty on December 11, 2002.

Appellant submitted a 14-page statement containing allegations about her supervisor, Virgil Martinez, and an office secretary, Miriam Dixon. She alleged that: Mr. Martinez harassed her in April 2000 when he asked her to sign him up for training courses with her; he forced her to schedule temporary duty (TDY) trips for both of them at the same time; he constantly called her at home and on her cellular telephone; during a May 2001 TDY trip to New Orleans, he attempted to force her to visit a "nude bar" and, when she refused, he repeatedly called her hotel room and knocked on her room door; during a May 2001 trip to New Orleans, he peeked through a window into her hotel room; in July 2001, he left a voice message on her office telephone which ended with "I love you," which a coworker, Alvin Harrell overheard; at an office-sponsored party in August 2002, Mr. Martinez became agitated when she danced with an old friend, yelled out her name and stated: "See if I ever let you come to another P2 Conference again;" his behavior and comments resulted in her character assignation by fellow coworkers; in August 2001, Ms. Dixon began following her around; Ms. Dixon stopped ordering office supplies for her but continued to order supplies for others in the office; Ms. Dixon allegedly lied about appellant reporting leave; appellant was exposed to a difficult work environment when her request to move to a different office was denied and her eyes were sensitive to the amount of sunlight exposure; Ms. Dixon did not receive adequate training for her position as the hazardous waste manager; and she was stressed by an Office Special Investigation (OSI) investigation.

In an October 25, 2002 medical report, Dr. Jennifer Lothian, a psychiatrist, diagnosed a depressive disorder and indicated that appellant was seen for a psychiatric evaluation regarding emotional distress attributed to a difficult work environment. The physician noted that appellant reported that she was harassed by a supervisor and coworkers for the past six months. As an example, appellant described that she was forced to have her desk in an office where the sunlight caused eye discomfort as she had cataract surgery. Outside stressors were denied.

In a January 3, 2003 statement, Raye A. Griffin, supervisory environmental engineer, advised that she has been appellant's direct supervisor since October 2002 and that Mr. Martinez was appellant's supervisor prior to that time. She noted that all office spaces were essentially the same and, due to lack of personnel, Ms. Dixon was moved into a office where appellant had wanted to work. Ms. Griffin stated that both appellant's current office and the office were the same size and each had windows with shades to reduce the amount of light. He stated that appellant's computer has a glare screen. She noted that Ms. Dixon was the official timekeeper and that Mr. Martinez allowed individuals to call their leave request into Ms. Dixon and was lax about documenting leave, compensation time and overtime. He noted that appellant had been upgraded on January 27, 2002, even though she had not completed one of the required courses. Ms. Griffin denied any first hand knowledge of appellant's other allegations but noted the following: When she had gone TDY with other individuals, usually only one person filled out the TDY request, Ms. Dixon completed. Prior to Mr. Martinez being subjected to two OSI investigations, appellant and Mr. Martinez spent a lot of time together at work; he and appellant mutually called each other; and appellant did not make much effort to avoid him until after the OSI investigation started. Ms. Griffin stated that, although she had no first hand knowledge of appellant's duties under Mr. Martinez, there were numerous things he ended up doing, which she would have expected appellant to have completed.

In email responses to Ms. Griffin's request for first-hand knowledge, the work environment or sexual harassment pertaining to appellant, Charles J. Rothrock, Acting Flight Chief, Belle Matthew, Ph.D, Captain Tim Imdieke, Paul T. Mangano, Alvin Harrell and Ms. Dixon denied any specific knowledge of appellant's condition or its cause. Mr. Harrell thought that Mr. Martinez might have had a crush on appellant and opined that appellant had played Mr. Martinez to go as far as he could take her in the environmental flight. Ms. Dixon stated that appellant had been given and afforded every courtesy imaginable and opined that appellant had never conducted herself in a professional manner in either her job duties or in her manner of dress. She stated that appellant was always in Mr. Martinez's office or calling him. Ms Dixon stated that she had called appellant a liar when appellant had told someone that Mr. Martinez called her constantly, even while on TDY and was obsessed with her. She indicated that appellant never talked directly to her and that everything, even as simple as office supply requests, had to come through Mr. Martinez.

In an undated statement, Mr. Martinez denied appellant's allegations. He stated that, as the P2 program manager, he was required to take certain courses to remain current on his certification and that he needed some of the training courses appellant also required. Mr. Martinez advised that he and not appellant, submitted requests for the training courses and that the Environmental Education Center provided the authorization for each employee to take the course. He indicated that he had known appellant for over seven years and had, what he would consider to be, a good and close friendship. Mr. Martinez stated that, when appellant would remind him that she had to finish something she was working on, he would feign and leave, but was never offended. He stated that he has never been jealous of her talking with anyone at any time. Mr. Martinez stated that he would call appellant at home only after she would call him and leave him a message to call her at home or on her cellular telephone. He stated that, although most calls were business related, he had also called her as a friend. Mr. Martinez noted that, although appellant spent time out of her office, she often called him to let him know where she was going. He indicated that, on appellant's behalf, he had asked Captain Imdieke and Mr. Rothrock whether she could move to the vacant office down the hall because her eyes were bothering her and was told that she could either close the door or rearrange her office to be away from morning glare. Mr. Martinez indicated that appellant had wanted him to confront Ms. Dixon about a missing fax, but stated that he refused to do so as he had no basis to think that Ms. Dixon would have intentionally taken the fax. With regard to supplies, he indicated all requests for office supplies were given to him so he would be the only person responsible for forwarding the list to Ms. Dixon. Mr. Martinez advised that appellant started missing a lot of work in early 2002 and would call him stating that she would be late or would not be coming in. He stated that he spoke with her several times about being late, but it had gotten to the point where he would call her at home to see whether she was coming in. Mr. Martinez also stated that he had spoken to appellant several times about her performance, noting that she had lost her focus, her work product was slipping, he had to complete 5 of 6 projects for her in order to meet deadlines. He advised appellant that, if her work did not improve, she might not be promoted. Mr. Martinez stated that Mr. Rothrock made the final decision whether appellant would be promoted. He denied inviting appellant to a sex club, but noted that she had expressed curiosity about what went on and, since he was also curious, he went to one and called her from there. Mr. Martinez indicated that appellant stated that she was coming over, but she never did. He indicated that a Mr. Spoonmoore had played some taped telephone conversations he had with appellant and had provided copies of such telephone

messages to the OSI. Mr. Martinez advised that his friendship with appellant continued until after the OSI investigation.

In a letter dated February 14, 2003, the Office requested that appellant describe in detail the employment-related incidents which she believed contributed to her illness. In a March 13, 2003 statement, appellant alleged that, in April 2000, Mr. Martinez told her to start putting him in for the same training courses that she attended regardless of his need for the course or not. She stated that, as Mr. Martinez was the program manager, most of these courses were not necessary for someone in his position.

Appellant stated that on May 14, 2001 she and Mr. Martinez had attended an environmental class in New Orleans. She noted that, on the last night in New Orleans, Mr. Martinez wanted to see nude girls on Bourbon Street and asked her to go with him. She declined and told him to ask Nick Durflinger, a coworker from their office. Appellant alleged that Mr. Martinez got angry when she told him that she did not feel comfortable at a place like that and kept on asking her. She related that it was around 10:00 p.m. at night, she was playing a slot machine and that she stayed playing slots until around 1:00 a.m. waiting for him to leave. When he finally left, she ran to her room and locked the door. Appellant stated that her telephone started to ring about 2 minutes after she entered her room and rang for approximately 20 minutes straight, but she did not answer. She stated that approximately 5 minutes after the telephone stopped ringing, Mr. Martinez knocked on her door for approximately 15 to 20 minutes saying: "Terri I know you're in there open up," but she did not answer the door. Appellant stated that she had noticed that the shutter on the right side of her room door had come open by the knocking and when that happened, the knocking stopped. She indicated that her telephone later rang for another 15 to 20 minutes.

Appellant had signed up for an alligator sight seeing tour the next day, which Mr. Martinez had signed up with her. She stated that when she called the front desk in the morning to find out what time the bus was arriving for the alligator trip, she was told that Mr. Martinez had cancelled the trip earlier that same morning. Appellant alleged that, when Mr. Martinez called her on her room telephone approximately an hour later, she told him that he had no right to cancel her alligator trip. Appellant also stated that, when Mr. Martinez had asked her why she did not answer her door or telephone the prior night, she told him that it was late and that he had no business coming to her room. She indicated that Mr. Martinez had told her on the plane trip home from New Orleans, he had looked at her several times through the door shutter windows to her room and that he was very sorry for having done that.

Appellant indicated that, in August, after the New Orleans TDY, she had lunch with Mr. Martinez and Ms. Dixon and had confided to Ms. Dixon about Mr. Martinez snooping at her window. She alleged that Ms. Dixon then told Mr. Martinez and this spoiled the personal relationship she had shared with Ms. Dixon. Appellant further alleged that on several occasions Mr. Martinez had stated that she was pretty and, in an email told her that he was divorcing his wife and had wanted to have a relationship with her. Appellant told Mr. Martinez that she was not interested and that she had a boyfriend.

Appellant alleged that, in July 2001, Mr. Harrell came to her office discussing work while she was checking her telephone messages and one of the messages was from Mr. Martinez

inquiring about her weekend and contained the closure "I love you." She indicated they both were shocked. Appellant alleged that Mr. Martinez had on other occasions, such as emails, stated that he loved her personality, how easy it was to talk to her and how down to earth she was. Appellant alleged that, prior to the telephone answering machine incident, Mr. Harrell and her had gotten along well, but a few weeks after the incident, Mr. Martinez told appellant that she was now a supervisor and would have to tell the others how to do their work. Appellant stated that Mr. Harrell and others complained to the union and the practice stopped. Since then, she stated that Mr. Harrell became distant and negative towards her.

Appellant alleged that her current supervisor, Ms. Griffin, had exacerbated the situation and made the workplace even more unbearable. With regard to an August 2002 office party, she stated that Mr. Martinez was unprofessional and that it had ruined her night. Appellant asserted that Lt. Bender had noticed this and asked a friend to take her away from the party while he kept Mr. Martinez's attention, so that Mr. Martinez would not follow her.

In a January 28, 2003 statement, Ms. White, Systems Administrator, stated that she had noticed a dramatic change in appellant's behavior and personality and suggested that appellant seek some personal counseling.

In a decision dated July 16, 2003, the Office denied appellant's claim, finding that the incidents which it found to be factually established did not arise in the performance of duty.

On August 4, 2003 appellant requested a review of the written record. E-mails from Brock Henderson, appellant's union representative, concerning a request to mediate a 14-day suspension were submitted, together with a partial complaint regarding appellant's 14-day suspension. An October 28, 2003 memorandum from Debbie Clark, Labor Relations Officer, advised that appellant had contacted an Equal Employment Opportunity (EEO) Officer on October 31, 2002 raising over 30 allegations of discrimination and that an EEO counselor's report was generated for informational purposes. She noted that appellant had filed a formal complaint of discrimination on February 26, 2003 and an investigation had taken place on August 7 and 8, 2003. It was noted that a final agency decision had not yet been issued. A partial copy of an EEO counselor's report was submitted.

In a December 8, 2003 report, Dr. Joshua D. Holland, an internist, advised that appellant was being treated for anxiety. The anxiety was compounded by stress at work and was impacting her work performance.

By decision dated December 30, 2003, an Office hearing representative affirmed the July 16, 2003 decision, finding that appellant had not established a compensable factor of employment thus, had not met her burden of proof in establishing that she sustained an emotional condition in the performance of duty.

In a January 26, 2004 letter, appellant requested reconsideration. She submitted an undated, partial affidavit initialized by Mr. Rothrock. An underlined section containing the notation "relevant evidence" was written in the margin.

In a decision dated February 10, 2003, the Office denied appellant's request for reconsideration finding that her letter neither raised substantive legal questions nor included new and relevant evidence.

## ***LEGAL PRECEDENT -- ISSUE 1***

To establish that she sustained an emotional condition causally related to factors of her federal employment, appellant must submit: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to her condition; (2) rationalized medical evidence establishing that she has an emotional condition or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that her emotional condition is causally related to the identified compensable employment factors.[1]

Workers' compensation law does not apply to each and every injury or illness that is somehow related to one's employment. There are situations where an injury or illness has some connection with the employment, but nevertheless, does not come within the purview of workers' compensation. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability is deemed compensable. Disability is not compensable, however, when it results from factors such as an employee's fear of a reduction-in-force or frustration from not being permitted to work in a particular environment or hold a particular position.[2] Perceptions and feelings alone are not compensable. To establish entitlement to benefits, a claimant must establish a basis in fact for the claim by supporting her allegations with probative and reliable evidence.[3]

Actions of a claimant's supervisors or coworkers, which are characterized as discrimination or harassment may constitute a compensable factor of employment. However, for discrimination or harassment to give rise to a compensable disability under the Federal Employees' Compensation Act, there must be evidence that the harassment or discrimination alleged did, in fact, occur.[4] Mere perceptions or feelings of harassment do not constitute a compensable factor of employment.[5] An employee's allegation that she was harassed or discriminated against is not determinative of whether or not the alleged incident of harassment or discrimination occurred.[6] To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting her allegations with probative and reliable evidence.[7]

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[1] *See Kathleen D. Walker*, 42 ECAB 603 (1991). Unless a claimant establishes a compensable factor of employment, it is unnecessary to address the medical evidence of record. *Garry M. Carlo*, 47 ECAB 299, 305 (1996).

[2] *Lillian Cutler*, 28 ECAB 125 (1976).

[3] *Ruthie M. Evans*, 41 ECAB 416 (1990).

[4] *Shelia Arbour (Vincent E. Arbour)*, 43 ECAB 779 (1992).

[5] *See Lorraine E. Schroeder*, 44 ECAB 323 (1992).

[6] *See William P. George*, 43 ECAB 1159 (1992).

[7] *See Frank A. McDowell*, 44 ECAB 522 (1993).

Grievances and EEO complaints by themselves, do not establish that workplace harassment or unfair treatment occurred.[8]

## ***ANALYSIS -- ISSUE 1***

Appellant has not attributed her emotional condition to the performance of her regular or specially assigned duties as a hazardous waste manager with the employing establishment. Rather, she has alleged harassment and a hostile work environment by employing establishment managers and personnel. The Board must look to the evidence of record to determine whether appellant's allegations are substantiated by probative and substantial evidence.[9]

The Board notes that the record contains a portion of an EEO counselor's report, together with some material concerning grievance of a 14-day suspension. Unfortunately, there is no way to verify that the allegations contained within this material are accurate or to establish a basis in fact for the contentions made.[10] The documents are devoid of a signature from the counselor to verify the information contained within the report and the grievance; both documents are incomplete with only select portions provided; and there are no copies of the witness statements to verify that the witness's actually said what the counselor alleged in the EEO report. As previously stated, it is appellant's burden to establish a factual basis for her claim by supporting her allegations with probative and reliable evidence.[11] Accordingly, this material is of limited probative value.

Appellant alleged that her supervisor, Mr. Martinez, harassed her by instructing her to schedule training courses and TDY trips for both of them at the same time. Mr. Martinez stated that as the P2 program manager he was required to take certain courses to remain current on his certification. He additionally stated that he submitted the requests for the training courses and that the Environmental Education Center provided the authorization over who would take the courses. The Board has carefully reviewed the evidence of record and finds that it is insufficient to establish harassment by Mr. Martinez with regard to the scheduling of training courses and TDY trips with appellant. It is evident from Mr. Martinez's statement that he was required to take such courses to maintain his certification. Moreover, as the Environmental Education Center had to authorize each training course, it maintained the final authority over the applicant's selection of such training courses. As appellant did not submit any evidence to establish a factual basis for her allegation, it does not constitute a compensable factor of employment.[12]

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[8] *James E. Norris*, 52 ECAB 93 (2000).

[9] *See Beverly R. Jones*, 55 ECAB __ (Docket No. 03-1210, issued March 26, 2004). (The primary reason for requiring factual evidence from the claimant in support of his or her allegations of stress in the workplace is to establish a basis in fact for the contentions made, as opposed to mere perceptions of the claimant, which in turn, may be fully examined and evaluated by the Office and the Board).

[10] *Id.*

[11] *Alice M. Washington*, 46 ECAB 382 (1994).

[12] *See Linda J. Edwards-Delgado*, 55 ECAB ___ (Docket No. 03-823, issued March 25, 2004). (An employee's allegation that she was harassed or discriminated against is not determinative of whether or not the alleged incident of harassment or discrimination occurred).

Appellant alleged that Mr. Martinez caused a hostile work environment by calling her at home and on her cellular telephone. However, despite the Office's February 14, 2003 letter requesting additional information, appellant failed to provide specific details and/or dates as to when such telephone calls were made by Mr. Martinez. Vague or general allegations of perceived "harassment" arising in the employment are insufficient to give rise to compensability.[13] The Board further notes that statements from Ms. Griffin, Mr. Harrell, Mr. Martinez and Ms. Dixon indicate that the communication between appellant and Mr. Martinez was mutual. Mr. Martinez advised that he has known appellant for over seven years and had a "good and close friendship." He advised that, although he had called her as a friend, appellant often called him and most of the telephone calls were business related. Ms. Dixon's statement confirms that most of the conversations were business related and that appellant often left her home or cellular number as the number to contact. Mr. Martinez related that, in early 2002, appellant started missing work and that he called her at home to see whether she would be coming into work. This matter was related to her work duties or conditions of employment; however, appellant has not alleged in her claim that she sustained a stress-related condition due to the direct effects of Mr. Martinez calling her at home and inquiring about her work status for that day.[14] She did not establish an employment factor in this regard.

Appellant alleged that, during a May 2001 TDY assignment in New Orleans, LA, Mr. Martinez attempted to coerce her into visiting a nude bar and, when she refused, he knocked on her room door and rang her hotel telephone. She further alleged that he canceled a previously scheduled sightseeing trip had looked through the window into her hotel room when she had refused to open the door. Mr. Martinez denied appellant's allegations but noted that he had gone to a sex club and had called appellant, who had said that she was coming over but never arrived. Although, appellant stated that she had confided in Ms. Dixon about Mr. Martinez snooping in her window during a lunch in August, Ms. Dixon's statement failed to mention the New Orleans incident and the record contains no probative evidence establishing that either of these alleged instances occurred. Appellant has not established a compensable factor in this regard.

Appellant alleged that Mr. Martinez sexually harassed her. In July 2001, she asserted that he had left a telephone message which ended with "I love you," which Mr. Harrell had overheard. However, both Mr. Martinez and Mr. Harrell denied any knowledge of this incident. Appellant has also asserted that Mr. Martinez became upset and yelled at her during a P2 conference office party when she danced with a friend. Although, appellant had asserted that a Lt. Bender had witnessed Mr. Martinez's unprofessional behavior, the record is devoid of any statement from Lt. Bender or any other witness corroborating her version of the event. Furthermore, appellant's allegations that Mr. Martinez paid her personal compliments, had expressed an interest in starting a relationship with her and that Mr. Martinez's behavior and comments towards her resulted in her character assignation by fellow coworkers are nonspecific with regard to alleged harassment and discrimination.[15] Appellant has not submitted any

[13] *See Beverly R. Jones, supra note* 9.

[14] *See Lori A. Facey*, 55 ECAB ___ (Docket No. 03-2015, issued January 6, 2004) (where appellant failed to establish an employment factor when she did not allege in her claim, that she sustained a stress-related condition due to the direct effects of sexual harassment by her former supervisor).

[15] *See Beverly R. Jones, supra* note 9.

evidence to establish her allegations; thus, she has not established an employment factor in this regard.

Appellant has also alleged harassment on the part of the office secretary, Ms. Dixon, whom she claimed followed her around the air force base. Although the record reflects that appellant spent time out of her office, there is no evidence of record to suggest that Ms. Dixon was instructed to follow her. She has not established an employment factor in this regard.

Appellant has also cited specific administrative actions by her supervisors as contributing to her emotional condition. These include: Ms. Dixon's refusal of ordering appellant's supplies; the denial of a request to transfer to another office; and she was not adequately trained for her position. It is well established that administrative or personnel matters, although generally related to employment, are primarily administrative functions of the employer rather than duties of the employee.[16] The Board has also found, however, that an administrative or personnel matter may be a factor of employment where the evidence discloses error or abuse by the employing establishment.[17] In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[18]

In regard to appellant's allegation that Ms. Dixon refused to order her supplies, the evidence of record reflects that Mr. Martinez, as P2 program manager, had instituted an office procedure that all supply requests come through him and he would be the only person responsible for forwarding the request to Ms. Dixon. Mr. Martinez, thus, confirmed that Ms. Dixon was not instructed to order office supplies for any employee who did not follow the established procedure of providing the request to Mr. Martinez first. The employing establishment's decision to establish an office procedure for requesting office supplies is an administrative or personnel matter as it is not a duty of the employee. The Board finds that there is no probative evidence of error or abuse in this administrative matter. Without such supporting evidence, appellant has failed to establish any factor of employment.

Appellant alleged that the sunlight in her office affected her vision and her request to transfer to another office was denied. Ms. Griffin advised that both offices had windows with shades so there should be no problem reducing the amount of light. Appellant's computer was also noted to have a glare screen. Mr. Martinez further advised that Captain Imdieke and Mr. Rothrock told him that appellant could either close the door or rearrange her office to be away from the morning glare. The decision to move an employee to another office concerns an administrative or personnel matter. Appellant has not submitted any probative evidence that the employing establishment acted erroneously.

Appellant asserted that she was not adequately trained for her position. The Board has frequently explained that matters involving the training of an employee are administrative

[16] *Anne L. Livermore*, 46 ECAB 425 (1995); *Richard J. Dube*, 42 ECAB 916 (1991).

[17] *See Michael Thomas Plante*, 44 ECBA 510 (1993).

[18] *Charles D. Edwards*, 55 ECAB ___ (Docket No. 02-1956, issued January 15, 2004); *Anna C. Leanza*, 48 ECAB 115 (1996).

functions.[19] In this case, appellant has presented no evidence of administrative error or abuse regarding her training. Therefore, it is not compensable under the Act.

Appellant alleged that she was stressed out by an OSI investigation. Although the record confirms that an OSI investigation took place, there is no copy of the investigation in the record or what matters were discussed during the OSI investigation. Absent this information, there is no way to show that this matter was related to appellant's work duties or conditions of employment.[20] She has not established an employment factor in this regard.

As appellant has not established a compensable factor of employment, it is not necessary to address the medical evidence of record.[21]

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

Under section 8128(a) of the Federal Employees' Compensation Act, the Office has the discretion to reopen a case for review on the merits.[22] Section 10.606(b)(2) of Title 20 of the Code of Federal Regulation provide that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; (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 Office.[23] Section 10.608(b) provide that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[24]

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

Appellant's January 26, 2004 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, she did not advance a relevant legal argument not previously considered by the Office. Appellant alleged that the submitted affidavit was pertinent and relevant to the case without stating a foundation or basis as to how or why such affidavit was pertinent or relevant. Consequently, she is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).[25]

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[19] *Jose L. Gonzalez-Garced*, 46 ECAB 559 (1995); *Michael Thomas Plante*, *supra*, note 17.

[20] *See Lori A. Facey*, *supra* note 14.

[21] *Garry M. Carlo*, 47 ECAB 299 (1996).

[22] 5 U.S.C. § 8128(a).

[23] 20 C.F.R. § 10.606(b)(2) (1999).

[24] 20 C.F.R. § 10.608(b) (1999).

[25] 20 C.F.R. §§ 10.608(b)(2)(i) and (ii) (1999).

With respect to the third requirement, that the information submitted constitutes relevant and pertinent new evidence not previously considered by the Office, appellant submitted evidence in support of her alleged emotional condition claim in the form of an affidavit of Mr. Rothrock. While this evidence mentions an OSI report concerning Mr. Martinez and appellant and was not previously of record, it is not relevant to the instant claim. Mr. Rothrock's undated, partial affidavit has no direct bearing on the events that allegedly contributed to appellant's claimed emotional condition. The underlined portion of the affidavit containing the hand notation "relevant evidence" merely relates that Mr. Rothrock, after reviewing an OSI report concerning Mr. Martinez and appellant, thought that Mr. Martinez was not a good supervisor and had disciplined him through a demotion and reassignment to a physically different building. There is no mention of the content of the OSI report and Mr. Rothrock's opinion towards Mr. Martinez and the disciplinary action issued has no bearing on appellant's claim. As this evidence does not constitute "relevant and pertinent new evidence," it is insufficient to warrant modification of the prior decision. Accordingly, appellant is not entitled to a review of the merits of her claim based on the third requirement under section 10.606(b)(2).[26]

As appellant is not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2), the Board finds that the Office did not abuse its discretion in denying appellant's January 26, 2004 request for reconsideration.

## ***CONCLUSION***

The Board finds that appellant failed to establish that she sustained an emotional condition in the performance of duty. The Board further finds that the Office properly denied appellant's January 26, 2004 request for reconsideration.

[26] 20 C.F.R. § 10.608(b)(2)(iii) (1999).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the February 10, 2004 and December 30, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 18, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member