**OFFICE OF COMPLIANCE**
**LA 200, John Adams Building, 110 Second Street, S.E.**
**Washington, DC 20540-1999**

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| **EDWARD E. EASTHAM,** | ) | |
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| **Appellant,** | ) | |
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| | ) | **Case Number: 06-CP-41 (RP)** |
| **U.S. CAPITOL POLICE BOARD,** | ) | |
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| **Appellee.** | ) | |
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**Before the Board of Directors: Susan S. Robfogel, Chair; Barbara L. Camens; Alan V. Friedman; Roberta L. Holzwarth; Barbara Childs Wallace, Members.**

## DECISION OF THE BOARD OF DIRECTORS

This case is before the Board on the petition of Complainant Edward E. Eastham ("Eastham"), an employee of the U.S. Capitol Police ("USCP"), seeking review of the hearing officer's decision granting USCP's motion for summary judgment, pursuant to Section 5.03(d) of the Procedural Rules of the Office of Compliance.

### I. Background; *Eastham I*

Edward Eastham was hired by USCP in 1999 as an electrician technician in the Maintenance Section, and almost immediately suffered a work-related back injury. In 2001, Eastham suffered another back injury at work, and ultimately underwent back surgery in 2002 and again in 2003 following yet another injury. During this entire period, he was given light duty assignments in an effort to accommodate his medical restrictions.

In 2000, he was transferred to the Project Planning Section where he was assigned modified or "hybrid" duties. Unlike other Planning Section employees, he primarily performed Computer Aided Drafting and Design ("CAD") work, but he was also responsible for managing a small portfolio of projects, which required him to perform quality assurance, surveys and inspections at various project sites around Capitol Hill. Because of medical restrictions on crawling, climbing and like activities, USCP accommodated Eastham by providing assistance to him when his project

management duties required such activity. He continued to perform these duties during the years that followed. In late 2004, his doctors determined that he had reached "MMI" – i.e., maximum medical improvement -- and in the spring and summer of 2005, he requested a noncompetitive promotion as well as various accommodations under the ADA.

In April 2006, Eastham filed a Complaint alleging that USCP engaged in disability discrimination against him by failing to grant certain requests for accommodation, in violation of the Americans With Disabilities Act ("the ADA") and Section 201(a)(3) of the Congressional Accountability Act, 2 U.S.C. 1311(a)(3) ("the CAA"). The Complaint also alleged that USCP retaliated against Eastham for asserting his rights under the ADA by refusing to grant him a noncompetitive promotion and by failing to engage in an "interactive process" to identify reasonable accommodations, in violation of Section 207 of the CAA. Finally, the Complaint alleged that USCP created a retaliatory and discriminatory hostile work environment. This case was docketed on our records as No. 5-CP-55 (DA,RP) (hereinafter *"Eastham I"*).

On May 30, 2007, the Board issued its Decision in *Eastham I,* in which it affirmed the hearing officer's decision granting USCP's motion for summary judgment and dismissing the Complaint in its entirety. Thereafter, Eastham filed a petition for review in the Federal Circuit (Docket No. 2007-6004). Review proceedings are pending at this time.

**II. <u>The Instant Proceeding</u>**

In the summer and fall of 2005, numerous meetings were held in response to Eastham's accommodation requests in *Eastham I,* during which USCP undertook to identify a vacant position that Eastham could perform with little or no accommodation. By mid-November, a potentially suitable Data Management position in USCP's Systems Operations Section had been identified and a position description had been drafted with a view to offering the position to Eastham.

On December 19, 2005, after consultation among the affected USCP offices, Ann Kurtz, USCP's Worker's Compensation Programs Manager, met with Eastham to discuss the proposed transfer and to explain the various procedural steps that would have to take place before a formal offer could be made.

On January 6, 2006, Kurtz sent Eastham's doctor a description of the Data Management position and requested that he determine "ASAP" whether the job was one Eastham could perform within his medical restrictions. Ten days later, his doctor replied that the position was suitable. On January 30, Kurtz and Eastham met again, this time with Associate Human Resources Director Jennifer McCarthy present. Eastham was asked to submit his resume, which he did on February 10.

By letter dated March 9, Human Resources Director Jan Jones formally offered Eastham the Data Management job, which he accepted on March 17. Eastham began his new assignment on April 2. The transfer resulted in no loss of pay because the Data Management position is rated at grade

8, which was Eastham's pay grade in Project Planning. Eastham is able to perform his new assignment with minimal or no accommodation.

On November 9, 2006, after the completion of counseling and mediation proceedings mandated by Sections 401-403 of the Act (2 U.S.C. 1401-1403), Eastham filed the instant Complaint, in which he alleged five counts of retaliation under Section 207 of the Act, three of which he has abandoned. The remaining counts allege that the transfer from his Project Planning position to the Data Management position was a "constructive demotion," in retaliation for his having pursued ADA accommodations (Count I), and that during the reassignment process, USCP "violat[ed] . . . the settled and established statutory and regulatory scheme of the Federal Employees' Compensation Act" (FECA), also out of retaliatory animus (Count IV).

Subsequently, USCP filed a motion for summary judgment which the hearing officer granted in its entirety. With respect to Count I, the hearing officer concluded that Eastham "cannot establish a prima facie case or prove, by a preponderance of the evidence, that [USCP] discriminated against him in reprisal when he was reassigned in April 2006." The hearing officer dismissed Count IV on jurisdictional grounds. In her view, the federal courts "have long barred judicial review of all matters arising under FECA," and therefore the "Office of Compliance does not have jurisdiction to review a claim of FECA violations."

## III. Standard of Review

The Board's standard of review for appeals from a hearing officer's decision requires the Board to set aside a decision if the Board determines the decision to be: (1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law; (2) not made consistent with required procedures; or (3) unsupported by substantial evidence. 2 U.S.C. §1406©).

Summary judgment is appropriate if there are no genuine issues of material fact and the movant is entitled to summary judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247 (1986). "By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact. Id., at 247-248. We review the hearing officer's grant of summary judgment *de novo.* See, e.g., *Medrad, Inc. v. Tyco Healthcare Group LP,* 466 F.3d 1047, 1050 (Fed. Cir. 2006).

## IV. Analysis

The Board has considered the hearing officer's decision, the parties' briefs, and the record in this proceeding. The Board agrees with the hearing officer that no genuine issue of material fact exists in this case, and that USCP is entitled to summary judgment as a matter of law. The Board also affirms the Hearing Officer's underlying findings and conclusions, except as modified herein.

*Count I: The alleged retaliatory constructive demotion.* Eastham alleges that his Project Planning

job was a career ladder grade 7-8-9 position, while the Data Management position had no promotion potential, and that the transfer thus amounted to a constructive demotion, animated by a retaliatory motive. We fully agree with the hearing officer's determination that Eastham has "not proffered evidence demonstrating that the reassignment was caused by a discriminatory animus . . . or that there is any nexus between his protected activity and the reassignment." In the hearing officer's words:

> The evidence shows that [Eastham's] physician's determination that he was at maximum medical improvement, as well as [Eastham's] assertions that he needed more accommodation than he was already receiving to fully perform his light duty assignment, created a need for [USPC's HR office] to totally review [Eastham's] light duty assignment and seek a vacant position which he could fully perform within his medical restrictions. [Eastham] has not presented or proffered any evidence to dispute [USCP's] reasons for reassigning him in April 2006.

Eastham argues that a retaliatory motive can be inferred from the fact that the transfer was involuntary, and that the offer letter warned him that if he rejected the offer, he would be terminated. We find this argument unpersuasive. USPC had long maintained, in apparent good faith, that the hybrid Project Planning position Eastham had occupied was a light duty assignment it had created to accommodate his physical disabilities during his numerous periods of recuperation, and that his position of record all times remained the physically demanding job for which he had been hired back in 1999.[1] The hearing officer herself specifically found in *Eastham I,* and reaffirmed in the instant case, that the Project Planning/CAD assignment was a "temporary light duty" position during the entire period leading up to the events in these cases. When Eastham reached MMI and sought additional accommodations beyond what USCP had long provided to him, it was logical for USCP to search for a permanent solution that was seemingly in everyone's interest, and to terminate the light duty assignment that, as we observed in *Eastham I,* Eastham continued to have problems performing, even with accommodation.[2] Indeed, USCP had every reason to believe that the transfer was acceptable to Eastham himself; there is no indication that he raised the slightest objection to the proposed transfer until the day he accepted the new assignment, and even on that occasion, while complaining of "duress," did not express a preference for or a desire to return to the Project Planning position.

In our view, no inference of improper motivation for transferring Eastham is permissible on these

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[1]Eastham has conceded that USCP maintains no permanent light duty positions.

[2]An employer does not have an obligation under the ADA either to create light duty assignments (*Juanita Johnson v. Office of the Architect of the Capitol,* 99-AC-326 (2002), aff'd sub nom. *Office of the Architect of the Capitol v. Office of Compliance,* 361 F.3d 633 (Fed. Cir. 2004)), or "to convert temporary light duty assignments into permanent ones"(*William v. Eastside Lumberyard,* 190 F.Supp.2d 1104, 1119 (S.D. Ill 2001), and cases cited).

facts. We agree with the hearing officer that "[Eastham] has not presented or proffered any evidence to dispute [USCP's] reasons for reassigning him in April 2006."[3]

We are also cognizant of our findings in *Eastham I,* which conclusively establish that during the summer and fall of 2005 – the very same time period during which Eastham now claims USPC was formulating a retaliatory scheme to constructively demote him – USCP was actively engaged in the kind of interactive process required by the ADA to identify ways in which Eastham's disability could be accommodated. There is no evidence that USCP was harboring darker motives during this otherwise lawful interactive process and that its true aim was to punish Eastham for invoking the ADA. We have no hesitation in affirming the hearing officer's determination that Eastham "cannot establish a prima facie case of retaliation."[4]

*Count IV: The alleged FECA violation.* The hearing officer also dismissed Eastham's claim that USCP "violated" the FECA "regulatory scheme." For the following reasons, we agree that summary judgment is warranted on Count IV.

The gravamen of this allegation, as explained in Eastham's written submissions, is that USCP "manipulated" the FECA process in furtherance of a retaliatory scheme to demote him. The short and dispositive answer to this contention is that Eastham fails to identify any evidence that supports a finding that USCP subverted, abused or "violated" the FECA process. In particular, Eastham offers no support for his contention that USCP misled DOL as to the date on which Eastham returned to work following his injury. Nor, as the hearing officer found, and we have agreed, is there any evidence of a retaliatory scheme to demote Eastham.[5]

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[3]Eastham does not contend that the transfer itself constituted disability discrimination under the ADA and Section 201(a)(3) of the CAA; his sole contention is that the transfer was animated by a retaliatory motive, in violation of Section 207.

[4]The hearing officer also found that Eastham failed to proffer evidence to support his claim that the Project Management position had promotion potential, and that, in any event, since "an employee is not guaranteed a promotion to the higher grade level," it is a "factual impossibility to conclude that the April 2006 reassignment . . . is a demotion . . .." In affirming the hearing officer's dismissal of Count I, we do not rely on these findings. In particular, we leave for another day the question whether a retaliatory transfer from a position with promotion potential to one without such potential can amount to actionable adverse action under Section 207. See *Britton v. Office of the Architect of the Capitol,* 02-AC-20 (2005) (holding that claims based on employment actions that are "reasonably likely to deter" the exercise of protected activity are actionable under Section 207).

[5]Eastham's briefs are entirely devoid of citations to the record, in flagrant noncompliance with Procedural Rule 8.01(b)(1)'s requirement that briefs "shall refer specifically to the portions of the record . . . that are alleged to support each assertion made on appeal." Counsel is admonished to comply with this requirement in the future.

Eastham asserts that USCP manipulated the FECA process by advising him in its March 9 letter that DOL had determined that the position was "suitable" for purposes of FECA, when in fact DOL had not yet made a suitability determination. We reject this contention. The March 9 letter was addressed to Eastham, not DOL, and therefore could not have had the purpose or effect of subverting DOL's suitability determination. Moreover, we see no other basis for characterizing the March 9 letter as retaliatory or as an attempt to manipulate the FECA process. The hearing officer found that DOL had telephonically approved the transfer prior to March 9, but even if DOL had not yet given its imprimatur, USCP had every reason to believe that DOL would approve the transfer, which it did shortly thereafter.[6] USCP may have jumped the gun in an attempt to expedite the transfer process, but no inference is warranted that either the March 9 letter or the transfer itself were animated by an intent to punish Eastham for seeking ADA accommodation.

Since Count IV fails for lack of proof, we need not address the jurisdictional issues raised by Count IV. We note, however, that this Board has no mandate or plenary authority under the CAA to remedy abuses or police the integrity of the FECA process. On the other hand, we do have plenary jurisdiction to protect legislative employees from reprisals for exercising rights protected by the CAA. To the extent that the hearing officer's decision suggests that the Board would be powerless to protect employees from reprisals involving the FECA process, we do not adopt her jurisdictional findings. We express no opinion today as to whether such claims would in fact fall within our cognizance under the CAA.

*Eastham's claim of bias and "prejudgment."* Eastham contends that the hearing officer approached the instant case with a "predetermined and irrevocably closed point of view which deprived [him] of a fair and impartial consideration of the instant matter on its own merits." We find no evidence to support this claim. Although Eastham complains that the hearing officer mischaracterized the evidence and made erroneous findings in *Eastham I*, these are arguments that are properly presented to an appellate body and do not themselves support a finding of bias or prejudgment. In the Supreme Court's words, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. * * * Almost invariably, they are grounds for appeal, not recusal." *Liteky v. U.S.,* 510 U.S. 540, 555 (1994).

Bias is also said to be shown by the hearing officer's rulings on certain procedural motions in the instant case, including a motion for further discovery that was filed outside the date set by the hearing officer for the completion of discovery. Since the procedural issues addressed in these motions are quintessentially matters committed to the sound discretion of the trier of fact, Eastham's claims of prejudgment and abuse of discretion are devoid of any support in the record

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[6]DOL approval of this particular transfer was largely a formality. As the hearing officer observed, Kurtz, who had previously worked in DOL's FECA unit, knew that "formal DOL approval" is not even required where, as here, "there is no loss of wages or change in grade, the employee is not on the DOL periodic roll, and the employee's physician has deemed the job suitable."

or the case law. "These are merely adverse rulings, and do not themselves support a bias charge. *U.S. v. Nicki,* 427 F.3d 1286, 1298 (10th Cir. 2005). We have considered Eastham's other claims of prejudgment and find them to be completely lacking in merit.

## ORDER

Pursuant to Section 406(e) of the Congressional Accountability Act and Section 8.01(d) of the Office's Procedural Rules, the Board affirms the Hearing Officer's determination of no violation in this matter.

*It is so ordered.*

Issued, Washington, D.C.: February 25, 2008