

**UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NEW YORK DISTRICT OFFICE**

SANDRA M. McCONNELL,)	
A/K/A VELVA B., ET AL.)	EEOC Case No. 520-2010-00280X
Class Agent,)	
v.)	Agency No. 4B-140-0062-06
)	
)	Administrative Judge
MEGAN J. BRENNAN,)	Monique Roberts-Draper
POSTMASTER GENERAL,)	
UNITED STATES POSTAL SERVICE,)	
Agency.)	DATE: April 18, 2019

**MOTION TO HAVE AGENCY PROVIDE
NRP ACTIVITY FILES TO ADMINISTRATIVE JUDGE**

The Agency has submitted “administrative files” and “dispute statements,” but the Agency has not provided the Administrative Judge with *evidence* related to individual relief claims. Specifically, even though the Agency compiled an NRP Activity File for each employee subjected to review under the program, the Agency has not provided NRP Files to the Administrative Judge. Pursuant to the Commission’s class complaint regulations, the Administrative Judge should require the Agency to provide the NRP Activity Files for each Claimant. This step is crucial in order for the Administrative Judge to have access to key documentation associated with each claim for relief, thus facilitating efficient adjudication.

A. Background on NRP Activity Files

NRP Activity Files were described in detail in the Commission’s Phase I decisions in this case. The Commission noted that the written policies for the NRP “instructed injury compensation specialists from the Agency’s 74 district offices to prepare ‘activity files’ for all employees” who would be reviewed under the NRP. *McConnell v. USPS*, EEOC Nos. 0720160006 & 0720160007 (2017). These NRP Activity Files “contained records relating to the employee’s medical condition, modified job assignment, OWCP claims, and information related to any EEO matter, grievance, MSPB proceeding, settlements or any other decisions pertinent to the employee.” *Id.* The NRP files “would be updated” by Agency staff members during the

course of the evaluation of the employee under the program. *Id.* NRP Activity Files were not provided to the employees, but rather were compiled and maintained by Agency management.

Consider, for example, the attached pages from Class Agent Sandra McConnell's NRP Activity File.¹ Exhibit A. Ms. McConnell's NRP Activity File contains documents showing the NRP evaluation of her, such as a notice to attend a "National Reassessment Process Meeting" (USPS HQ 000008), management notes regarding the NRP meeting with Ms. McConnell (USPS HQ 000029), and a Notice to Ms. McConnell taking away her modified Carrier position (USPS HQ 000002-3). The NRP Activity File includes the modified assignment that was offered to and accepted by Ms. McConnell before the NRP (USPS HQ 000004-5). And the NRP Activity File has medical documentation showing Ms. McConnell's restrictions at the time of the NRP, such as a status update from her physician (USPS HQ 000006), a form listing the specific physical restrictions placed on Ms. McConnell by her doctors (USPS HQ 000007), and the diagnosis and specific workplace injury sustained by Ms. McConnell (USPS HQ 000031-32).

These documents directly establish the following: Ms. McConnell was subject to evaluation under the NRP; her medical information was improperly included and shared in an NRP file; she was a qualified individual with a disability; and her modified work assignment was taken away due to the NRP. In this way, the NRP File for each Claimant will immediately answer questions that are essential to each claim for relief. But the Agency has apparently decided to withhold these critical files from the Administrative Judge.

B. Legal Support for Providing NRP Activity Files to Administrative Judge

The Agency should be required to provide the Administrative Judge with NRP Activity Files so that these highly-relevant documents may be considered along with the claims for relief filed by Claimants. Pursuant to the Commission's class complaint regulations for Phase II, the "administrative judge may hold a hearing or otherwise supplement the record on a claim filed by a class member." 29 C.F.R. § 1614.204(1)(3). The Commission should have access to these records directly from the Agency in order to efficiently adjudicate Claimants' relief submissions.

¹Class Agent Sandra McConnell submitted her claim for individual relief directly to the Agency pursuant to OFO's Order on March 9, 2018. An appeal is currently pending with OFO regarding the Agency's award of individual relief to Ms. McConnell.

NRP Activity Files provide contemporaneous evidence that is key to the Administrative Judge's review of relief claims. For example, an NRP Activity File shows conclusively that a claimant was subject to evaluation under the NRP. The NRP Activity File also demonstrates that a claimant's medical information was improperly stored and disclosed, as it was the NRP Activity Files themselves on which the Commission based its findings on that legal claim. Further, an NRP Activity File includes medical information from the time of the NRP, thus establishing a claimant's standing as a qualified individual with a disability. And an NRP Activity File provides evidence regarding any action taken by Agency management with respect to a claimant's employment as a result of the NRP, such as a reduction in the employee's work hours or reassignment to a different position. In sum, NRP Activity Files provide important, contemporaneous evidence central to the determination of claims for individual relief.

The Supreme Court explained why an employer found liable in a class action bears the burden of proof in subsequent relief proceedings. In addition to observing that the employer is "a proved wrongdoer" in the case, the Court noted that "the employer was in the best position to show why any individual employee was denied an employment opportunity. **[T]he company's records were the most relevant items of proof.**" *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 359 n.45 (1977) (emphasis added).

Here, the Agency's own records (NRP Activity Files) provide the most relevant items of proof. However, the Agency has withheld those files from the Administrative Judge. Further, the Agency is withholding those records from the Claimants. USPS employees subject to review under the NRP were not provided a copy of their NRP Activity Files. And even though the Agency produced limited NRP Activity Files to Phase I Class Counsel during class-wide liability discovery, the NRP Activity File records that were produced were incomplete.²

²Undersigned counsel recently requested that the Agency rectify issues related to the production of NRP Activity Files, so that we would be able to present all NRP Activity Files for all class members to the Commission. The Agency refused to provide the complete NRP Files.

Conclusion

For the reasons stated above, the Administrative Judge should require the Agency to provide to the Commission a complete record of all NRP Activity Files for all Claimants in this matter, with a copy of an individual Claimant’s complete NRP Activity File sent to the Claimant and the Claimant’s representative. A proposed order is attached.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing MOTION TO HAVE AGENCY PROVIDE NRP ACTIVITY FILES TO ADMINISTRATIVE JUDGE was filed via HECAPS and served via electronic mail on this the 18th of April, 2019 upon:

Hon. Monique Roberts-Draper
Administrative Judge
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ORDER TO AGENCY TO PROVIDE NRP ACTIVITY FILES

Having reviewed the Motion to Have Agency Provide NRP Activity Files to Administrative Judge, any Agency response thereto, and the record in this matter, and finding the Motion meritorious, the Motion is hereby GRANTED. It is hereby ORDERED that within thirty (30) days of the date of this Order, the Agency shall provide to the Administrative Judge the entire contents of the NRP files associated with each and every Claimant in this matter. It is further ORDERED that within thirty (30) days of the date of this Order, the Agency shall provide a copy of each NRP file to each respective individual Claimant and the Claimant's representative.

SO ORDERED.

For the Commission:

Administrative Judge