United States Department of Labor
Employees' Compensation Appeals Board

DANIEL J. NEWBERG, Appellant	)	
and	)	**Docket No. 04-1430**
	)	**Issued: November 19, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Southeastern, PA, Employer	)	

Appearances:
Daniel J. Newberg, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On May 7, 2004 appellant filed a timely appeal from a February 2, 2004 nonmerit decision of the Office of Workers' Compensation Programs which denied his request for reconsideration without merit review and an August 29, 2003 merit decision of an Office hearing representative that affirmed the denial of his emotional condition claim and denied his request to subpoena witnesses and documents. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the denial of the subpoena request, the merits of this case and the nonmerit reconsideration denial.

ISSUES

The issues on appeal are: (1) whether appellant has met his burden of proof that he sustained an emotional condition in the performance of duty; (2) whether the Office properly denied appellant's request to subpoena witnesses and documents; and (3) whether the Office properly refused to reopen appellant's claim for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On April 8, 2002 appellant, then a 47-year-old mail handler, filed a claim alleging that as of March 26, 2002 he developed stress, anxiety and depression due to harassment and improper treatment in connection with his federal employment. In accompanying statements, appellant claimed that Jim Bryant, a supervisor, and friends of Mr. Bryant harassed him, made threats against him, acted cruel to him, told others of his medical conditions and watched him on video surveillance. He also advised of a March 26, 2002 incident whereby he was threatened by coworkers and a supervisor. In a January 23, 2002 report, Dr. Vincent E. Baldino, a general practitioner, noted that appellant had fever, muscle cramps, joint pain, sweats, chills, fatigue and cephalgia. In disability slips dated March 27 and April 23, 2002, Dr. Baldino diagnosed stress/anxiety from undue stress from work and opined that appellant was totally disabled from March 25 to April 24, 2002.

In an April 11, 2002 letter, Kenneth L. Reading, appellant's supervisor, related that on March 26, 2002 he took appellant and Coworkers Sam Williams and Sandy Lewis off the workroom floor as they were loud. He advised that appellant claimed Mr. Williams was pushing mail in his face as Mr. Williams had placed a bulk mail container in appellant's area while appellant was not present. Mr. Reading also denied any awareness of allegations by Mr. Bryant and his friends.

By letter dated August 26, 2002, the Office advised appellant that the evidence submitted was insufficient to establish his claim. The Office further advised appellant about the type of factual and medical evidence he needed to submit to establish his claim.

Appellant submitted additional statements in which he alleged that the employing establishment improperly denied his request for leave under the Family Medical Leave Act (FMLA) in April 2000; that he was improperly disciplined for absence without leave (AWOL); that he was threatened on March 26, 2002 by coworkers and a supervisor; that on May 6, 2002, he found a threatening note under his coffee cup at work, written on a paper towel; that the employing establishment stalked and harassed him; and that he was subjected to discrimination and harassment by the employing establishment.

By decision dated October 25, 2002, the Office denied appellant's claim finding that he failed to establish that he sustained an emotional condition in the performance of duty.

In a November 5, 2002 letter, appellant requested an oral hearing before an Office hearing representative. In a letter dated December 15, 2002, appellant requested that the Office hearing representative issue a subpoena to compel Michael Petrucelli, a postal employee, to testify about the March 26, 2002 incident. He requested that subpoenas be issued for records of the Postal Service at Southeastern Processing and Distribution Center (P&DC) for evidence regarding intimidation, threats of violence against him and his family, and any documentation on any actions taken. Appellant also requested that records and information be subpoenaed from the following organizations: the Equal Employment Opportunity (EEO) Complaint Processing division of the Postal Service at Southeastern P&DC, the Postal Service Labor Relations Office, the Postal Service Inspector General's Office, the Department of Labor's Wage & Hour Office, the mail handlers union office for union grievances, steps 1 and 2, filed since 1998; and the

Safety Department for reports against Southeastern P&DC since 1998. By letter dated June 5, 2003, the Office hearing representative denied appellant's requests for subpoenas. Appellant was advised that the denial of his requests for subpoenas was not appealable until the Office hearing representative rendered a decision.

Appellant testified at the hearing which took place on June 23, 2003. With regard to his allegation that he was denied leave under the FMLA, appellant testified that the employing establishment denied the request and suspended him for 14 days for AWOL which he testified that he had requested FMLA leave for his hepatitis condition. Appellant alleged that the time and attendance office made false statements that he had failed to generate the required 3971 form to request the FMLA leave. Appellant asserted that although contrary evidence was submitted he had submitted the required 3971 form as supported by statements from coworkers. Appellant also testified that he had filed an EEO complaint pertaining to the FMLA and disciplinary suspension issues, but noted that he had lost the EEO complaints he had filed in 1999 and 2003. He advised that a complaint in the U.S. District Court against the employing establishment for harassment and discrimination was pending.

Appellant testified that the employing establishment altered his leave records and improperly charged him for his lunch period.

Appellant testified that on March 26, 2002 he was verbally threatened by Coworkers Ken Adams and Mr. Williams, and supervisor, Lonnie Anderson. He testified that Mr. Williams called him a "bum" and a "loser" and that Mr. Anderson stated that he was "standing in the corner and doing nothing." He testified that he reported the incident to the Postal Service Inspector General's Office.

Appellant also testified about the note he found under his coffee cup on May 6, 2002 which read "think outside of the box" and was initialed "BK," whom appellant asserted was Coworker Mr. Adams, otherwise known as the "Big Kahuna." Appellant stated that he considered the note a threat but that the employing establishment did not investigate.

Appellant additionally testified that the employing establishment had him under video surveillance.

Evidence submitted at the hearing and after the hearing included: a September 20, 2001 statement by Coworker Anthony Bright and a September 21, 2000 statement by Manager Cheryl Lomax, both which confirmed that appellant had generated a 3971 form on April 16, 2000; a copy of the EEO Commission decision in Newberg v. John S. Potter, postmaster general, Docket No. 170-A1-8234X, wherein an administrative judge found that appellant failed to establish a *prima facie* case of discrimination and that the evidence did not support that the employing establishment's charge of AWOL in April 2000 and notice of suspension was a pretext for unlawful discrimination; an undated FMLA investigative report from Michael Freeman, a wage and hour inspector, stating that appellant was denied family medical leave and that the employing establishment had marked him AWOL for three days. The report noted that appellant's desire to keep information from his supervisor may have caused him to provide too little information for his supervisor to have reached the conclusion that an absence was related to an FMLA protected condition. The report further noted that appellant rejected the employing

establishment's offer to remove the three days of AWOL from appellant's record, grant three days of administrative leave and provide Mr. Bryant with FMLA training and that he had rather filed an EEO claim.

In a June 16, 2003 statement, Mr. Petrucelli, a coworker, stated that he heard a one-sided, loud confrontation with Mr. Williams belittling appellant in the registry room where he worked. He advised that derogatory comments were made toward appellant concerning his work ability and a charge that he was on some type of delusional drugs and should resign.

In a March 5, 2000 report, Dr. Lance S. Wright[1] noted that a psychiatric evaluation was requested for appellant to start therapy for chronic hepatitis C. The physician found no acute or chronic psychiatric diagnosis, no significant personality disorder but that the stressors of concern to appellant related to hepatitis C and the possibility of spreading to other family members.

By decision dated August 29, 2003, the Office hearing representative modified the October 25, 2002 decision to find that appellant established a compensable factor of employment with regard to derogatory remarks made by coworkers on March 26, 2002 but affirmed the denial of the claim as the medical evidence failed to support causal relation. By letter dated June 5, 2003, the Office hearing representative further noted that appellant's requests for subpoenas had been denied.

In a November 4, 2003 letter, appellant requested reconsideration and essentially repeated prior allegations. Appellant also submitted duplicative evidence, which related to his April 2000 request for FMLA leave and AWOL charge along with evidence pertaining to recent requests for administrative leave. In an April 18, 2000 disability slip, Dr. Baldino indicated that appellant was under his care on April 16 through 19, 2000 for chronic depression and stress.

A May 28, 2003 report generated by the Office of the Inspector General found that appellant's allegations of retaliation for the allegedly stolen and destroyed PS Form 3971 for leave requested under the FMLA did not meet the criteria for a whistleblower reprisal investigation.

A June 26, 2003 incident report from the Tredyffrin Township Police Department noted that Michael Willard of the employing establishment was contacted with regard to appellant's allegations of stolen and missing files but that the employing establishment reported no missing or stolen files.

By decision dated February 2, 2004, the Office denied appellant's request for reconsideration finding that he failed to submit either new and relevant evidence or legal contentions not previously considered.

LEGAL PRECEDENT -- ISSUE 1

To establish that he sustained an emotional condition causally related to factors of his federal employment, appellant must submit: (1) factual evidence identifying and supporting

[1] Dr. Wright's credentials could not be discerned from the record.

employment factors or incidents alleged to have caused or contributed to his condition; (2) rationalized medical evidence establishing that he has an emotional condition or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that his emotional condition is causally related to the identified compensable employment factors.[2]

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 to hold a particular position.[3] 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 his allegations with probative and reliable evidence.[4]

In cases involving emotional conditions, the Board has held that when working conditions are alleged as factors in causing disability, the Office, 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.[5] If a claimant implicates a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.[6]

For harassment or discrimination to give rise to a compensable disability under the Federal Employees' Compensation Act, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act. 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. Grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred. Where an employee alleges harassment and cites specific incidents, the Office or other appropriate fact finder must determine the truth of the allegations. The issue is not whether the claimant has established harassment or discrimination under EEO Commission standards. Rather, the issue is whether the claimant under the Act has

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[2] *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).

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

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

[5] *See Normal L. Blank*, 43 ECAB 384 (1992).

[6] *Marlon Vera*, 54 ECAB ___ (Docket No. 03-907, issued September 29, 2003).

submitted sufficient evidence to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[7]

ANALYSIS -- ISSUE 1

A claimant must support his or her allegations with probative and reliable evidence.[8] Appellant has alleged, without providing any corroborative evidence, that the employing establishment: altered his leave records, improperly charged him for his lunch period, subjected him to surveillance, had its employees follow or stalk him. As appellant failed to provide sufficient evidence to substantiate these allegations, he has not established that these incidents occurred as alleged.

Appellant's allegation pertaining to the denial of his FMLA leave in April 2000 and the subsequent imposition of an AWOL charge relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.[9] Although the handling of disciplinary actions and leave requests are generally related to the employment, they are administrative functions of the employer, and not duties of the employee.[10] However, the Board has also found that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[11] In this case, appellant did not submit sufficient evidence to establish that the employing establishment committed error or abuse with respect to these matters. The basis of the denial of appellant's FMLA leave and the related suspension for AWOL was due to the fact that appellant did not submit adequate medical documentation to support his request. In his report, Mr. Freeman, the wage and hour inspector, noted that the employing establishment's attorney stated that appellant's desire to keep information from his supervisor may have caused him to provide too little information for his supervisor to have reached the conclusion that the absence was related to an FMLA protected condition. In a decision on the matter, an administrative judge found that the record did not contain evidence that the employing establishment acted improperly in these matters and that appellant had not submitted sufficient documentation to be afforded FMLA leave. Thus, appellant has not established that the employing establishment committed error or abuse regarding his issue.

Appellant also contends that he considered a May 6, 2002 note which stated "think outside of the box" to be a threat to him and his family and that he was verbally and physically threatened by derogatory comments made by his coworkers, Mr. Williams and Mr. Adams, and a supervisor, Mr. Anderson, in a March 26, 2002 altercation. Actions by coworkers or supervisors

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

[8] *Id*.

[9] *Janet I. Jones*, 47 ECAB 345, 347 (1996); *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993).

[10] *Id.*

[11] *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

that are considered offensive or harassing by a claimant may constitute compensable factors of employment to the extent that the implicated disputes and incidents are established as arising in and out of the performance of duty.[12] Mere perceptions or feelings of harassment, however, are not compensable. To discharge his burden of proof, a claimant must establish a factual basis for his claim by supporting his allegations of harassment with probative and reliable evidence.[13]

To the extent that appellant is claiming harassment in the workplace with respect to the May 6, 2002 note, the Board finds that there is no factual support for that allegation. As alluded to the above, the mere perception of harassment is not sufficient to establish a compensable factor of employment,[14] and appellant has provided no corroboration that such harassment occurred. Moreover, appellant has not shown how the isolated incident of receiving a note which said "think outside the box" related to his regular or specially assigned duties to enable the incident to rise to the level of a compensable employment factor under the Act. Accordingly, appellant has not established the May 6, 2002 incident as a compensable factor of employment.

With regard to appellant's assertion that he was verbally and physically harassed by derogatory comments made by his coworkers, in a March 26, 2002 altercation, Mr. Petrucelli's statement of June 16, 2003 supports that the coworker, Mr. Williams, had made some derogatory comments toward appellant. Based on this uncontradicted evidence, the Board finds that appellant has established that he was verbally harassed and that it constitutes a compensable factor of employment. With regard to whether there was also a physical threat on March 26, 2002, the Board has recognized the compensability of physical threats in certain circumstances. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under the Act.[15] Based on the evidence of record, the Board finds that appellant has not established that he was physically threatened on March 26, 2002 as alleged. Mr. Reading's April 11, 2002 statement advised that appellant and his coworkers were "getting loud" on March 26, 2002, but did not indicate what, if any, remarks or comments were made to appellant. Mr. Petrucelli's statement also does not support that appellant was threatened with violence by either Mr. Williams, Mr. Adams or Mr. Anderson. Thus, while the derogatory comment is established as fact, appellant has not established that he was physically threatened on March 26, 2002.

In this case, the only compensable factor appellant established was that his coworkers made derogatory comments to him on March 26, 2002. Appellant's burden of proof, however, is not discharged by the fact that he has established an employment factor, which may give rise to a compensable disability under the Act. To establish his occupational disease claim for an emotional condition, appellant must also submit rationalized medical evidence establishing that he has an emotional or psychiatric disorder and that such disorder is causally related to the accepted compensable employment factor.[16] Rationalized medical opinion evidence is medical

[12] *See Marie Boylan*, 45 ECAB 338 (1994); *Gregory J. Meisenburg*, 44 ECAB 527 (1993).

[13] *Ruthie M. Evans*, *supra* note 4.

[14] *Anna C. Leanza*, 48 ECAB 115 (1996).

[15] *Harriet J. Landry*, 47 ECAB 543, 547 (1996).

[16] *See William P. George*, 43 ECAB 1159, 1168 (1992).

evidence, which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factor. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[17]

Although Dr. Baldino had, in his notes of March 27 and April 23, 2002, diagnosed stress/anxiety from "undue stress from work" and found that appellant was totally disabled for the period March 25 to April 24, 2002, the physician failed to provide sufficient medical rationale explaining how the accepted employment factor caused or contributed to appellant's emotional condition.[18] In fact, Dr. Wright found that no psychiatric condition existed and that appellant's stressors were related to his hepatitis C condition. None of the physicians specifically referenced appellant's employment or referenced a specific work factor or explained how his diagnosed conditions were medically related to his federal employment. Accordingly, appellant has not met his burden of proof in establishing that a diagnosed condition was causally related to an accepted employment factor.

LEGAL PRECEDENT -- ISSUE 2

Section 8126 of the Act provides that the Secretary of Labor, on any matter within his jurisdiction, may issue subpoenas for and compel attendance of witnesses within a radius of 100 miles.[19] This provision gives the Office discretion to grant or reject requests for subpoenas. The Office regulation states that subpoenas for witnesses will be issued only where oral testimony is the best way to ascertain the facts.[20]

In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena "is the best method or opportunity to obtain such evidence because there is no other means by which, the testimony could have been obtained."[21] The Office hearing representative retains discretion on whether to issue a subpoena. The function of the Board on appeal is to determine whether there has been an abuse of discretion. Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are clearly contrary to logic and probable deductions from established facts.[22]

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[17] *Id.*

[18] *Id.*

[19] 5 U.S.C. § 8126.

[20] 20 C.F.R. § 10.619.

[21] *Id*.

[22] *Martha A. McConnell*, 50 ECAB 128 (1998).

ANALYSIS -- ISSUE 2

By letter dated December 15, 2002, appellant requested that the Office hearing representative issue a subpoena to compel Mr. Petrucelli to testify about the March 26, 2002 incident and that subpoena's be issued to the Postal Service at Southeastern P&DC for evidence and documents concerning intimidation, threats of violence and any documentation on actions taken. On June 5, 2003 the Office hearing representative denied the request. The Board finds that the Office hearing representative properly found that appellant did not explain why Mr. Petrucelli's testimony was the best way to ascertain the facts or why a written statement could not be submitted instead of oral testimony. Likewise, with regard to appellant's request to subpoena records from various branches of the employing establishment and the Mail Handlers Union, the Office hearing representative properly found that appellant did not explain what specific records were to be requested or why he thought such records were relevant and could not be obtained by other means, such as a request under the Privacy Act or Freedom of Information Act. The Office hearing representative further found that wage and hour files were protected by the Privacy Act and could not be obtained by subpoena without a release from all parties involved in the wage and hour matter.

Appellant did not explain why Mr. Petrucelli's testimony was the best way to ascertain the facts or why the information requested from the organizations could not be obtained from other avenues, such as a request under the Privacy Act or Freedom of Information Act. The Board notes that the Office hearing representative properly informed appellant that the denial of his requests for a subpoena would not preclude him from testifying at the hearing as to the specific incidents or events which he believed caused or contributed to his claimed condition.

In light of the fact that appellant had other viable alternatives available, the Board finds that the Office hearing representative acted within his discretion in not issuing a subpoena to either Mr. Petrucelli or the various organizations requested by appellant.

LEGAL PRECEDENT -- ISSUE 3

To require the Office to reopen a case for merit review under section 8128 of the Federal Employees' Compensation Act,[23] the Office's regulation provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[24] Section 10.608(b) provides that, when an application for review of the merits of a claim 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.[25] When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the

[23] U.S.C. §§ 8101-8193. Under section 8128 of the Federal Employees' Compensation Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[24] 20 C.F.R. § 10.606(b)(1)-(2).

[25] 20 C.F.R. § 10.608(b) (1999).

Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.[26]

ANALYSIS -- ISSUE 3

In support of his request for reconsideration, appellant provided additional medical evidence from Dr. Baldino dated April 18, 2000. Although Dr. Baldino indicated that appellant suffers from chronic depression and stress, his report is not relevant as he failed to causally relate such conditions to appellant's employment or to the established compensable factor of derogatory remarks appellant's coworkers made on March 26, 2002. Such evidence is insufficient to require reopening of appellant's case for further review of the merits of his claim pursuant to section 8128 as it does not address the point of issue and is irrelevant.[27]

Appellant also submitted additional evidence related to his April 2000 request for FMLA leave and AWOL charge along with evidence pertaining to recent requests for administrative leave. This evidence supports that appellant has had and currently has leave usage problems and has had leave requests under the FMLA. This evidence, however, is not relevant as it does not address whether the employing establishment may have erred in its administrative functions with regard to the denial of the April 2000 FMLA leave or the subsequent imposition of an AWOL charge.

Appellant also submitted a May 28, 2003 report generated by the Office of the Inspector General and a June 26, 2003 incident report from the Tredyffrin Township Police Department, concerning his allegations of missing, stolen or destroyed evidence pertaining to request for FMLA leave and retaliation concerns. These reports, however, are not relevant as they do not support appellant's allegation that he was harassed in the workplace or was retaliated against by the employing establishment.

Consequently, appellant was not entitled to a merit review because the information provided in his reconsideration request was, although new, not relevant or pertinent. He also did not advance a relevant legal argument that had not been previously considered by the Office. Additionally, appellant did not argue that the Office erroneously applied or interpreted a specific point of law. Thus, appellant is not entitled to a merit review of the merits of the claim based upon any of the above-noted requirements under section 10.606(b)(2). Accordingly, the Board finds that the Office properly denied appellant's November 4, 2003 request for reconsideration.

CONCLUSION

The Board finds that appellant has not established that he sustained an emotional condition in the performance of duty and that the Office's hearing representative did not abuse his discretion in denying appellant's subpoena request. The Board also finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[26] *Annette Louise*, 54 ECAB ___ (Docket No. 03-335, issued August 26, 2003).

[27] *Edward W. Malaniak*, 51 ECAB 279 (2000).

ORDER

IT IS HEREBY ORDERED THAT the February 2, 2004 and the August 29, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 19, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member