BEFORE THE SPECIAL PANEL
UPON CERTIFICATION BY
THE MERIT SYSTEMS PROTECTION BOARD

MIGUEL C. IGNACIO Petitioner v. UNITED STATES POSTAL SERVICE Agency	MSPB DOCKET NO. SF07528110438 EEOC PETITION NO. 03840005 SPECIAL PANEL NO. 1 DATE: February 27, 1986

DECISION

I.

INTRODUCTION

This case has been certified to the Special Panel by the Merit Systems Protection Board (MSPB) pursuant to its findings that the Equal Employment Opportunity Commission (EEOC) incorrectly interpreted a provision of civil service law, rule, regulation or policy directive.

Miguel Ignacio (appellant) was injured while on active duty in the Navy, resulting in a deformity of his right leg. He also suffered from flat feet. Appellant was released from the

Navy and classified as 10% disabled. Shortly thereafter, appellant applied for a position with the U. S. Postal Service as a distribution clerk. The Postal Service (agency) hired the appellant for that position in February 1977. For reasons unexplained in this record, the appellant was converted in May, 1977, to a letter carrier position. At some point appellant developed a heel spur in addition to his other lower leg deformities. On December 5, 1980, the agency decided to remove appellant, finding him unfit for duty as a letter carrier. On that same day, appellant requested that he be granted light duty or reassignment to a clerk position. Neither request was granted.

Ignacio appealed his removal to the Merit Systems Protection Board, raising an affirmative defense of handicap discrimination alleging a violation of 5 U.S.C. §2302(b)(1)(D). The presiding official found appellant's removal to be handicap discrimination because of the refusal by the agency to consider reassigning the appellant to a clerk position.

The agency appealed this decision to the MSPB pursuant to 5 C.F.R. §1201.114. The MSPB reversed its presiding official holding that consideration of reassignment is beyond the scope of an agency's duty to reasonably accommodate handicapped employees, concluding that EEOC regulations defining "qualified handicapped employee," 29 C.F.R §1613.702(f), and "reasonable accommodation," 29 C.F.R. §1613.704(b), dictated this result. The MSPB's decision discounted as merely precatory Office of Personnel

Management and Civil Service Commission issuances outlining reassignment as one of the possible modes of reasonable accommodation. The MSPB also found that reassigning appellant would have violated the agency's collective bargaining agreement.

Ignacio initiated a petition for review of the MSPB's decision to the EEOC in accordance with 5 U.S.C. §7702(b)(1). The EEOC found the MSPB's decision constituted an incorrect interpretation of the Rehabilitation Act and regulations promulgated thereunder. The EEOC concluded that the term "reasonable accommodation" could include reassignment to another position in the agency where appropriate. The EEOC also pointed to civil service policy directives and guidance in analogous situations which indicated that in some circumstances reassignment is an accepted and often efficacious method for accommodating handicapped employees. EEOC found that the Rehabilitation Act takes precedence over contrary terms in a collective bargaining agreement. The matter was then referred to the MSPB for further consideration pursuant to 5 U.S.C. §7702(b)(5)(B).[1]

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[1] This subsection provides for referral to the MSPB of any EEOC decision arrived at pursuant to its authority under 5 U.S.C §7702(b)(3)(B), which states:

> "(3) If the Commission makes a determination to consider the decision, the Commission shall, within 60 days after the date of the determination, consider the entire record of the proceedings of the Board and , on the basis of the evidentiary record before the Board, as supplemented under paragraph (4) of this subsection, either -
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> (A) concur in the decision of the Board; or

On referral, the MSPB reaffirmed its decision while conceding that the EEOC's determination regarding the precedence of the Rehabilitation Act over contrary terms of a collective bargaining agreement was correct. The MSPB found that civil service law does not establish a duty to consider reassignment of handicapped employees, and that the EEOC incorrectly interpreted civil service law when it found that the Rehabilitation Act's implementing regulations require an agency to consider reassignment. The matter was certified to the Panel by the MSPB, upon its finding that the EEOC had incorrectly interpreted a provision of civil service law, rule, regulation or policy directive.

(B) issue in writing another decision which differs from the decision of the Board to the extent that the Commission finds that, as a matter of law -

(i) the decision of the Board constitutes an incorrect interpretation of any provision of any law, rule, regulation, or policy directive referred to in subsection (a)(1)(B) of this section, or

(ii) the decision involving such provision is not supported by the evidence in the record as a whole.

II.

JURISDICTION

This is the first case certified to the Special Panel, an entity created by the Civil Service Reform Act. The purpose of the Special Panel is to resolve disputes between the MSPB and the EEOC concerning cases with mixed civil service law and discrimination law[2] issues that have been initially appealed to the MSPB. Counsel for Petitioner argued that the Panel's jurisdiction did not allow it to review the EEOC's determination. We will first examine our jurisdiction as set out in law.

For a matter to have reached the Special Panel for resolution, the following steps must have occurred. First, the MSPB must have decided an issue of discrimination law in its initial decision. Second, the EEOC must have decided that the MSPB's decision was in error as to its interpretation of discrimination law, and reversed the MSPB decision. Third, the MSPB must have reviewed the EEOC decision, and reached the conclusion that the EEOC decision reversing the MSPB was in error because the EEOC had misinterpreted a provision of civil service law,

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[2] The term "discrimination law" when used in this decision includes the body of law centering on the following statutes and all rules, regulations and policy directives promulgated thereunder: Section 717 of the Civil Rights Act of 1964, 42 U.S.C. §2000e-16; Sections 12 and 15 of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§631, 633a; Section 6(d) of the Fair Labor Standards Act of 1938, 29 U.S.C. §206(d); Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. §791.

rule, regulation or policy directive. Finally, upon reaching that conclusion, the MSPB must certify the matter to the Special Panel for a resolution of the matter.

The Panel's jurisdiction over this matter is set out in 5 U.S.C. §7702,[3] which establishes only one jurisdictional prerequisite, i.e., that the MSPB certify the matter to the Panel pursuant to 5 U.S.C. §7702(d)(1). Two possible grounds exist for certification. The MSPB may find as a matter of law

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[3] The pertinent parts of 5 U.S.C. §7702 establishing the jurisdictional prerequisite are:

> (c) Within 30 days after receipt by the Board of the decision of the Commission under subsection (b)(5)(B) of this section, the Board shall consider the decision and -
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> (2) to the extent that the Board finds that, as a matter of law, (A) the Commission decision constitutes an incorrect interpretation of any provision of any civil service law, rule, regulation or policy directive, or (B) the Commission decision involving such provision is not supported by the evidence in the record as a whole -
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> (i) reaffirm the initial decision of the Board; or
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> (ii) reaffirm the initial decision of the Board with such revisions as it determines appropriate.
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> (d)(1) If the Board takes any action under subsection (c)(2) of this section, the matter shall be immediately certified to a special panel described in paragraph (6) of this subsection.

either that the EEOC decision constitutes an incorrect interpretation of a provision of civil service law, rule, regulation or policy directive, or that its decision concerning such provision is unsupported by the evidence in the record. In this case the MSPB's certification rests on the first ground.

The next requirement, that the MSPB certify the matter to the Panel pursuant to 5 U.S.C. §7702(d)(1), means simply that certification must follow a finding by the MSPB that one or more of the above grounds for certification exists. The statute plainly provides for certification whenever "the Board takes <u>any action</u> under subsection (c)(2)." (Emphasis added.) Once a subsection (c)(2) finding is made, certification is automatic, leaving the Panel with no choice but to accept jurisdiction.

Indeed, the relevant legislative history supports the view that jurisdiction is automatically conferred by the fact of certification, leaving the Panel with the responsibility of resolving the issues in dispute. For example, the Senate described the Panel's role as follows:

> If the Board concludes against adopting the proposed Commission order, it means there still exists an unresolved dispute on a question of law between the two agencies...Where such a dispute persists after the repeated procedures available to both agencies to resolve their differences at an earlier stage, the Committee felt that the matter was of sufficient importance, and the legal issues well enough drawn, that the [Panel][4] should

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[4] The only meaningful difference between S.2640 as originally reported and 5 U.S.C. §7702(d) was that disputes between the MSPB and the EEOC would be resolved by the

> consider the matter and resolve the differences.

S. Rep. No. 969, 95th Cong., 2d Sess. 59 (1978).

The jurisdictional requirement has been met in this case. In its "Opinion and Certification Order," the MSPB found the EEOC to have "misinterpreted applicable civil service law, regulation and policy directives" in reaching its decision. Ignacio v. United States Postal Service, Docket No. SF07528110438, EEOC Petition No. 03840005, at 4, January 31, 1985, (hereinafter

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D. C. Court of Appeals rather than the Special Panel. Although review by the Court of Appeals was abandoned in favor of review by the Special Panel, the same considerations of coherent personnel policy and parity between the MSPB and EEOC were advanced by both the House and the Senate in the conference report:

> The conference substitute in §7702 adopts the Senate approach at the administrative level, with some modifications, but it places an administrative tribunal, ad hoc in nature, at the apex of the administrative process, rather than depending upon the Court of Appeals to resolve conflicts between the two agencies. The conference substitute maintains the principle of parity between the MSPB and the EEOC and establishes an appropriate balance in regard to the enforcement of both the merit system principles of title 5 of the Act of 1964 and other laws prohibiting discrimination. At the same time it preserves for EEOC, as proposed in Reorganization Plan No. 1 of 1978, authority for issuing general policy directives implementing title VII of the Civil Rights Act. This preserves an important policy role for EEOC which it may invoke, consistent with the requirements of law, regardless of the outcome of a particular case.

S. Con. Rep. No. 1272, 95th Cong., 2d Sess. 139 (1978). Throughout this decision, we will substitute "Panel" for "Court of Appeals" where the latter term appears in the legislative history.

referred to as Certification Order). The matter was simultaneously certified to this panel.[5]

A decision whether the EEOC correctly or incorrectly interpreted civil service law is properly a function of the Panel's duty to issue a final decision on the merits pursuant to §7702(d)(2). We find, therefore, that the requirements of §7702 are satisfied here, and that the Panel has jurisdiction to proceed.

III.

STANDARDS OF REVIEW

The Panel's scope of review is described in 5 U.S.C. §7702(d)(2) as deciding the issues in dispute. The Special Panel in deciding these issues is required to give due deference to the respective expertise of the MSPB and EEOC. 5 U.S.C. §7702(d)(2)(B). Conspicuously absent is any reference to

[5] At oral argument, counsel for appellant suggested that the Special Panel decline jurisdiction if we find that EEOC's decision was not based on an incorrect interpretation of civil service law. This is something we are neither required nor empowered to do. The decision to certify a matter to the Panel rests with the MSPB, and is dependent on its findings, without regard to the validity of the MSPB's findings. 5 U.S.C. §7702(c)(2). The Panel is granted no authority to decline or grant jurisdiction based on the propriety of the MSPB's certification. 5 U.S.C. §7702(d)(2)(A). Furthermore, a declination of jurisdiction by the Panel could have the result of leaving the MSPB and the EEOC decisions in conflict, and not resolving their differences for the benefit of the parties.

a recognized standard of review, such as "arbitrary and capricious" or "unsupported by substantial evidence." Faced with the lack of statutory and regulatory guidance, the Panel must decide what is meant by the terms "issues in dispute" and "due deference" in the above context. Although neither of these concepts is clearly defined in the statute, reasonable conclusions as to their meanings can be drawn by reference to legislative history and analogous appellate schemes.

A. "Issues in dispute."

As we discussed in Section II of this Decision, a matter must be certified to the Panel by the MSPB whenever the MSPB finds as a matter of law that an EEOC decision referred back to it under the §7702 system of "mixed case" resolution either (1) "constitutes an incorrect interpretation of any civil service law, rule, regulation or policy directive;" or (2) with respect to "such provision is not supported by the evidence in the record as a whole." 5 U.S.C. §7702(c). In this case, we are concerned only with the former category, which constituted the MSPB's rationale for certifying the matter now before us. In either case, however, the Panel's consideration of the issues in dispute is narrowly circumscribed by the language of the statute to one of whether the EEOC decision misapplies in some manner civil service law, rule, regulation or policy directive.

The legislative history of §7702(d) supports this construction, shedding light on Congress' rationale for creating the Special Panel. The House and Senate versions of the procedures for handling discrimination cases were quite different in the early developmental stages of the Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1111 (1978). The House preferred that all cases involving discrimination be heard by the EEOC, unless the EEOC in its discretion transferred jurisdiction to the MSPB. In the latter instance, an appeal of the MSPB decision to the EEOC was guaranteed, and the EEOC's decision would be final. There would be no certification to another body for the purpose of resolving disputes between the MSPB and the EEOC as to the proper outcome of such "mixed cases."[6]

The Senate provided a different option, stating in its report of the bill that:

> In the current instance, however, the EEOC would be overruling the MSPB on day-to-day matters that are central to its mission. Further, in assigning to the EEOC authority to define the boundaries between title VII violations and the principles of the Merit System, the plan gives to the EEOC a virtually unlimited mandate to determine jurisdiction on a wide variety of appeals. <u>The MSPB would be left in an inferior position to defend merit system principles</u>.

S. Rep. No. 750, 95th Cong., 2d Sess. 12 (1978) (emphasis added.) To ensure that the EEOC would not have the unreviewable power to dictate the meaning of civil service law, the Senate

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[6] This was the scheme favored by the Carter Administration in its "Reorganization Plan No. 1 of 1978, 3 C.F.R. 321 (1978), reprinted in 5 U.S.C.A. app. at 116 (West Supp. 1985), and in 92 Stat. 3781 (1978).

proposed in S.2640 the method of "mixed case" dispute resolution before the Special Panel that is now §7702(d).[7] The Senate Report, referring to the potential usurpation of the MSPB's role in defining civil service law, and citing the passage quoted above, explained that:

> The procedures adopted by the committee resolve these problems. The chief purpose of the committee amendment is to make sure that neither the Merit Systems Protection Board, nor the Equal Employment Opportunity Commission, will be able to overrule the other. Instead, the powers of the Board and the Commission are carefully balanced one against the other. The committee felt that it was absolutely essential to the success of the overall civil service reform effort that there be this creative balance between the authority of the Board and the Commission because of the unique nature of the issues involved. In addition, the procedures are designed to protect against inconsistent decisions by the Board and Commission, to prevent forum shopping, and to make the procedures for consideration of the same matter by both agencies as streamlined as possible.

S. Rep. No. 969, supra, at 52-53. The Conference Report also indicates that the final bill maintains this principle of parity. S. Con. Rep. No. 1272, supra, at 139.

Congress' intent to narrowly confine the MSPB to certification of issues involving incorrect interpretations of civil service law is manifest in a comparison of §7702(c) and (d) to the process by which the Office of Personnel Management (OPM) obtains review of MSPB decisions.[8] The Director of OPM

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[7] See n. 4 of this Decision.

[8] After describing the §7702(c) and (d) process of dispute resolution, the Senate Report states:

may obtain judicial review of final MSPB actions which constitute incorrect interpretations of and would have a substantial impact on civil service law. 5 U.S.C. §7703(d). The United States Court of Appeals for the Federal Circuit has strictly construed this provision, granting petitions for review only when it finds that civil service law has in fact been incorrectly interpreted and that the incorrect interpretation will have a substantial impact. See Devine v. Levin, 739 F.2d 1567 (Fed. Cir. 1984); Devine v. Sutermeister, 733 F.2d 892 (Fed. Cir. 1984). Significantly, the language of §7703(d) has not been interpreted to permit review of MSPB decisions which simply affect the operation of the civil service but do not constitute incorrect interpretations of civil service law itself. In like manner, we conclude that §7702(c)(2)(A) should be construed with deference to its plain meaning to require that the MSPB only certify matters to the Panel when the EEOC decision constitutes an incorrect interpretation of civil service law.

The balance struck by §7702 is really quite simple. The EEOC review is to ensure that the MSPB refrains from basing its decisions on incorrect interpretations of discrimination law. The MSPB certification to the Special Panel, on the other hand,

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In a similar vein, the section establishes an orderly and workable method for assuring OPM participation in Board proceedings and a means for OPM to appeal Board decisions to court where the Board and the Director have substantial disagreements about the proper interpretation or direction of the government's personnel laws.

ensures that the EEOC may not err by misinterpreting civil service law. The Panel will review the record, according due deference to the expertise of each agency to determine whether the substance of the EEOC's decision with which the MSPB disagrees was actually predicated on a misinterpretation of civil service law.

B. "Due deference."

The Panel is charged to "give due deference to the respective expertise of the Board and the Commission in making its decision." 5 U.S.C. §7702(d)(2)(B). The meaning of this provision is somewhat more problematic, as the concept of due deference is not clearly explained in either the statute or the legislative history. We are not, however, completely without guidance.

The following excerpt from the Senate Report on the Civil Service Reform Act explains that we are to give greater weight to the EEOC than the MSPB regarding interpretations of discrimination law, and greater weight to the MSPB than the EEOC where an interpretation of civil service law is involved.

> 9. Upon appeal, the [Panel] should review the entire record. (Subsection (i)(5)). It must decide the proper interpretation of the applicable statute and related law. It must decide whether the Board's application of the law to the evidence in the case was in fact reasonable, or whether the Commission was correct in concluding that the Board's conclusion in such matters was unsupportable as a matter of law. In applying the law, the [Panel] should pay due deference to the respective

> expertise of each agency. For example, the Commission's interpretation of the meaning of policy directives issued by it under title VII of the Civil Rights Act of 1964, as amended, or other anti-discrimination statutes is entitled to appropriate weight, just as is the Board's interpretation of the civil service laws under title V of the U.S. Code. In deciding, however, how to resolve any conflicting goals or standards caused by applying both the personnel rules and principles, and the anti-discrimination rules and principles to the same cause, the [Panel] will have to reach a decision on its own, without prejudicing the matter by according greater presumptive weight to how one agency or the other would resolve the conflicts.

S. Rep. No. 969, supra, at 60.[9] This passage fails to define what degree of deference is "due," or what weight is "appropriate". It simply states that matters of statutory interpretation are subjects of agency expertise deserving deference of some degree.

One analogy that is useful in determining the meaning of "due deference" is that of the Supreme Court when faced with a conflict between federal courts of appeals, between a federal and state court, or between a federal appellate court and a federal administrative tribunal. See Sup. Ct. R., Rule 17; Automobile Salesman's Union v. NLRB, 711 F.2d 383 (D.C. Cir. 1983). The Supreme Court is free to reach its own decision in accordance with what it determines to be the correct statement of relevant law. However, it has chosen to defer in varying degrees to statutory interpretations, conclusions of law, and findings of

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[9] "Panel" is substituted for "Court of Appeals" here. See n. 4 of this Decision.

fact reached in proceedings below. The Supreme Court defers to the highest court of a state for interpretations of that state's law when those interpretations are found to rest upon an adequate state ground. Hortonville Joint School Dist. No. 1 v. Hortonville Ed. Ass'n., 426 U.S. 482 (1976) on remand, 274 N.W. 2d 697 (Wis. 1979); Hemmenstein v. Superior Court of California, 340 U.S. 622 (1951).

Another helpful illustration of this type of deference is seen in the review by both the Supreme Court and federal appellate courts of the decisions of administrative tribunals such as the National Labor Relations Board (NLRB). The NLRB's interpretations of the National Labor Relations Act will usually be upheld even if the reviewing court might prefer a different interpretation. The NLRB's expertise in a matter is only ignored where its interpretation (a) has no reasonable basis in law; (b) is fundamentally inconsistent with the structure of the National Labor Relations Act; or (c) moves into a new area of regulation which Congress has not committed to it. Ford Motor Company v. NLRB, 441 U.S. 488 (1979); Automobile Salesman's Union, supra.

Although no instruction requires that the Special Panel follow this model, it does provide a useful analytical framework for deciding the extent to which the Panel is bound by the statutory interpretations posited by the MSPB and the EEOC. The third test set out above in Ford Motor Co. would be particularly

appropriate where either agency is arguably guilty of usurping the other's statutory territory.

For the foregoing reasons, we conclude that the Panel's standards of review of disputes between the EEOC and the MSPB in cases referred to it pursuant to 5 U.S.C. §7702(c)(2)(A) are as follows:[10]

(1) The Panel will overrule the MSPB and defer to the EEOC where (a) the EEOC decision does not constitute an incorrect interpretation of a provision of civil service law, rule, regulation or policy directives, and (b) the EEOC's decision that MSPB's interpretation of discrimination law was incorrect has a reasonable basis.[11]

(2) The Panel will defer to the MSPB leaving the MSPB's decision undisturbed (a) where the EEOC decision as found by the MSPB incorrectly interpreted a provision of civil service

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[10] It is emphasized that the standards of review enunciated above deal specifically with matters certified pursuant to §7702(c)(2)(A). We refrain from deciding a standard for the review for cases certified under §7702(c)(2)(B), as this provision is not before us.

[11] Chairman Ellingwood in his dissent claims we are unfairly imposing a standard of reasonableness on the EEOC, while requiring the MSPB to be correct. The Panel's standard of review is not designed to prejudice either the EEOC or MSPB. It is designed to prevent the MSPB from certifying cases to the Panel in which its basis for certification is merely MSPB's disagreement with EEOC's interpretation of discrimination law. The Special Panel will defer to the MSPB under circumstances when the EEOC is incorrect in its interpretation of civil service law and lacks a reasonable basis for finding that the MSPB has incorrectly interpreted discrimination law. These standards of review are intended to prevent either agency from forcing a Special Panel review on the merits of issues in the other agency's area of primary expertise without a sufficient basis to do so.

law, rule, regulation or policy directive and (b) the EEOC's conclusion in its decision that MSPB's interpretation of discrimination law was incorrect lacks a reasonable basis.

(3) The Panel will reach a decision addressing the merits of the case only where: (a) the decision of the MSPB that the EEOC decision incorrectly applied a provision of civil service law, rule, regulation or policy directive is correct, and (b) the decision of the EEOC that the MSPB, in its initial decision, incorrectly interpreted and applied discrimination law is correct, thus leaving the merits of the case to be correctly decided under civil service and discrimination law by the Special Panel.

IV.

APPLICATION OF THE STANDARDS OF REVIEW TO THIS CASE

Pursuant to its duty to certify to the Panel only those matters which it finds to constitute an incorrect interpretation of civil service law or to be without evidentiary support as a matter of law[12], the MSPB found in its "Opinion and Certification Order" that the EEOC's decision was based on misinterpretations of "several civil service policy directives...which suggests that reassignment must be considered as a possible means

[12] 5 U.S.C. §7702(c)(2), (d)(1).

of reasonable accommodation,"[13] and that the cited directives "do not support the conclusion that reassignment must always be considered as a means of reasonable accommodation." Certification Order at 4, 5. The MSPB went on to conclude:

> The Board finds that, absent a requirement in the Act to consider reassignment, any obligation an agency may have to reassign must be derived from civil service law, rule, regulation or policy directive. Title 5 of the U.S. Code sections 3301 and 3302 and one of the implementing regulations, 5 C.F.R. §335.102, provide agencies with authority to promote, demote or reassign... Therefore, we find that the EEOC's holding regarding mandatory consideration of reassignment was incorrect because it failed to consider the agency's authority under 5 C.F.R. §335.102 and erroneously interpreted civil service policy directives as set out in the FPM and the OPM handbooks.

Id., at 6.

In deference to the MSPB's expertise in interpreting civil service law, we concur in its finding that the civil service directives cited by the EEOC "do not support the [EEOC] conclusion that reassignment must always be considered as a means of reasonable accommodation." However, the MSPB's assertion that the EEOC's decision constituted an incorrect interpretation of civil service law is in error.[14]

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[13] The EEOC decision cited Federal Personnel Manual (FPM) 339 subchapter 1-3(b); FPM Letter 751-2 (February 4, 1983); Handbook of Selective Placement, OPM Doc. 125-11-3 at 18 (March 1979) Handbook of Reasonable Accommodation, OPM Doc. 720-A at 10 (March 1980).

[14] The dissent implies that the Panel's decision acknowledges that the EEOC was substantively wrong in its analysis of civil service law. Dissent at 3. This is incorrect. We find that the EEOC did not interpret civil

The EEOC does not rely upon its interpretation of civil service law as the necessary premise for its conclusion.[15] To the contrary, the directives cited by the EEOC are presented as persuasive, but not conclusive authority. The EEOC's first reference in this vein simply states that the MSPB dismissed the guidance of OPM directives, without indicating the weight the EEOC would accord those directives in arriving at its decision. EEOC at 8. After a lengthy analysis of the reasons reassignment should be considered as a matter of discrimination law, the EEOC refers again to civil service law, stating as an aside that: "For further guidance in this area, agencies should refer to: Handbook of Reasonable Accommodation (OPM 720-A, March 1980)." EEOC at 12. Finally, after considering the legislative history and case law regarding the meaning of "reasonable accommodation" under the Rehabilitation Act, and finding on that basis that reassignment must be considered, the EEOC again refers to "OPM's guidance" as illustrative, but not necessary, authority. EEOC at 14. Dispositive reliance on civil service law is absent.

Indeed, the MSPB's finding that the EEOC's decision was "therefore dependent on the Rehabilitation Act and the EEOC's implementing regulations found at 29 C.F.R. §1613.701 et seq." states the proper basis for EEOC's decision. Certification Order

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service law when it reached its decision.

[15] We note that it was the MSPB in its original decision that initially raised OPM's guidance in determining whether consideration of reassignment was required.

at 6 (emphasis added). We also find that the EEOC's decision was based upon the foundation of its interpretation of the Rehabilitation Act and its implementing regulations, a matter within the EEOC's exclusive authority. As such, we are not faced here with an incorrect interpretation of civil service law.

We must also consider, however, the MSPB's finding that "absent a requirement in the [Rehabilitation] Act...any obligation an agency may have to reassign must be derived from civil service law, rule, regulation or policy directive." Id. From this premise the MSPB concluded that reassignment need not be considered as a reasonable accommodation under the Act, since, in its view, all reassignment authority is vested in the area of agency discretion under 5 U.S.C. §§3301, 3302 and 5 C.F.R. §335.102. We are compelled to conclude differently.

The question of whether reassignment must be considered as a means of reasonably accommodating handicapped employees was answered affirmatively by the EEOC in this case as a matter of discrimination law. For the MSPB to find that absent an express reference to reassignment in the Act such a conclusion is "overbroad" is for the MSPB to engage in an interpretation of the Rehabilitation Act itself. Apart from the fact that this is not within the MSPB's area of expertise, the MSPB is not authorized by §7702 to take issue with EEOC decisions which in the MSPB's view misinterpret the Rehabilitation Act. It is permitted to disagree only as to misinterpretations of civil service law. Civil service law, and the implementation of that

law by the various federal agencies is specifically defined and limited by the Rehabilitation Act and other statutory proscriptions, the violation of which constitutes a prohibited personnel practice. 5 U.S.C. §2302(b)(1).

The MSPB may not force review on the merits of EEOC decisions based on discrimination law with which it disagrees by categorizing those decisions as falling within 5 U.S.C. §7702(c)(2). This would amount to an abuse of the appellate procedures outlined in §7702. The Panel will not countenance abuse of this process by the MSPB or the EEOC. The EEOC likewise may not apply discrimination law under §7702(b) to overturn a decision of the MSPB where the EEOC's interpretation or application of the law is so unreasonable as to amount to a violation of civil service law. Either scenario would upset the balance §7702 was intended to strike.

We therefore find that the MSPB's characterization of the EEOC's decision as constituting an incorrect interpretation of civil service law is erroneous. Unless an EEOC decision depends upon civil service law for its support, or is so unreasonable that it amounts to a violation of civil service law, it does not rise to the level of conflict with civil service law contemplated in 5 U.S.C. §7702(c)(2)(A), and will not be disturbed by the Panel.

Having found that the EEOC's decision does not constitute an incorrect interpretation of civil service law, rule, regulation or policy directive, it remains for us to determine whether there

is any reasonable basis for the EEOC's decision. We find that although there is room for disagreement on the merits, a reasonable basis for the decision does exist. The EEOC interpreted its own regulations in this instance, concluding that the list of accommodations therein was not inclusive, but should be construed as including reassignment. See 29 CFR §1613.704(b). We have not been apprised of any provision of law which would render such an interpretation unreasonable or preclude the possibility that reassignment is within the scope of reasonable accommodation. In fact, the EEOC advances its own reasons as to why such an interpretation is indeed reasonable. Whether it is the most reasonable or the only reasonable interpretation is irrelevant, since we need only find, as we have, that the EEOC's interpretation is reasonable and consistent with the Rehabilitation Act and regulations promulgated pursuant thereto.

Accordingly, the Special Panel defers to the EEOC in this matter and adopts the decision of the EEOC as the decision of the Special Panel.[16] Pursuant to 5 U.S.C. §7702(d)(3), this decision is referred to the MSPB which shall order the agency to take appropriate action including cancellation of the removal and the

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[16] The Panel is aware of the case law which tends to undercut the EEOC's decision, most notably Carty v. Carlin, CV-N-84-456S (D. Md. December 18, 1985); Jasany v. USPS, 33 FEP 1115, aff'd on other grounds, 755 F.2d 1244 (6th Cir. 1985); Alderson v. Postmaster General of the United States, 598 F.Supp. 49 (W.D. Okla. 1984); but does not find these cases dispositive. This decision simply leaves undisturbed a reasonable EEOC decision involving an interpretation of the Rehabilitation Act.

award of all payments and benefits to which the appellant is entitled as a result of this decision. Enforcement of this decision is the responsibility of the MSPB. The parties are notified that this decision is reviewable pursuant to 5 U.S.C. §7702(d)(2)(A).

Barbara J. Mahone
Barbara Mahone, Chairman
Special Panel

Clarence Thomas
Clarence Thomas, Chairman
Equal Employment Opportunity
Commission

DISSENTING OPINION OF HERBERT E. ELLINGWOOD

I concur that the Panel has jurisdiction. However, I respectfully dissent from the majority's upholding the conclusion of the Equal Employment Opportunity Commission ("Commission") that 29 U.S.C. § 501 *et seq.* ("Rehabilitation Act") and the regulations promulgated thereunder require consideration of reassignment as a reasonable accommodation.

This case has dual importance. It is the first decision of a panel constituted under 5 U.S.C § 7702. Additionally, we are presented with a significant substantive issue, the resolution of which will have wide ramifications in the federal government. Therefore, I am doubly concerned regarding the majority opinion. Future Panel members will be faced with a decision-making model which is inconsistent with statutory requisites and patently unworkable to resolve "issues in dispute" as envisioned by Congress. I cannot understand how the Panel will ever address substantive issues in dispute between the Commission and Board under the majority's analysis, clearly frustrating Congressional intent.

This appeal raises the following issue: do the Rehabilitation Act and the regulations promulgated thereunder (29 C.F.R. Part 1613, Subpart G) require the Postal Service to consider reassignment as an accommodation under 29 C.F.R. § 1613.702(f). The facts are set forth in the earlier orders of the Merit Systems Protection Board ("Board") and in the majority opinion of the Panel.

Part I of this dissent addresses a number of procedural issues related to the Panel's operation, focusing on the inconsistencies inherent in the majority's decision-making model. Part II addresses the merits of this appeal.

I. PROCEDURAL ISSUES

A. Jurisdiction

My understanding of the majority's decision is that there are two prerequisites to the Panel's jurisdiction: 1) a Board finding that the Commission decision is either an incorrect interpretation of a provision of civil service law, rule, regulation, or policy directive; or that the Commission decision is factually unsupported by the record; and, 2) Board certification of the matter to the Panel. I concur, and also agree that jurisdiction has been established in this matter.

B. The role of the Panel

Unfortunately, the majority deviates from the foregoing jurisdictional test in discussing the Panel's standard of review and the "issues in dispute". In effect, the majority *sub silentio* determines that there are additional requisite jurisdictional inquiries. I disagree.

It is difficult to understand the majority's decision-making construct, but it unnecessarily and improperly complicates the statutory mandate. Despite professed reliance on the statutory jurisdictional test, the majority states:

> The Panel will review the record, according due deference to the expertise of each agency to determine whether the substance of the EEOC's decision with which the MSPB disagrees was actually predicated on a misinterpretation of civil service law. (Page 14, emphasis supplied.)

If jurisdiction exists under the foregoing statutory test, it is error for the Panel to make an additional determination whether the Commission's reference to civil service law was dispositive, or necessary to the outcome of its decision. By focusing on the propriety of the certification order, the majority obfuscates the succinct statutory jurisdictional determination. Unfortunately, this

extra-statutory inquiry is the major thrust of the majority's decision.

Congress considered a difference in "interpretation" between the Commission and the Board sufficient to create an "issue in dispute". 5 U.S.C. §§ 7702 (b) and (c). There is no suggestion in the statute that the interpretation must be the "necessary premise" for the Commission's conclusion. Majority Opinion at 20. When the majority applies its gloss to the clear statutory jurisdictional requisites, it is apparent that virtually no interpretation in an area outside the Commission's or Board's respective spheres of primary responsibility will ever be a "necessary premise".1/

The majority's analytical inconsistencies originate in the use of imprecise terminology and a misreading of 5 U.S.C. § 7702(d)(2)(A):

> The Special Panel shall, within 45 days after a matter has been certified to it, review the administrative record transmitted to it and, on the basis of the record, decide the <u>issues in dispute</u> and issue a final decision which shall be a judicially reviewable action. (Emphasis supplied.)

This provision follows others which collectively describe a mixed case appeals process which culminates in the Panel's resolution of the inter-agency dispute. As relevant to this appeal, this process is as follows. Step one is the employee's appeal to the Board. This first Board decision addresses both the Title VII issue and the Title V issue. 5 U.S.C. § 7702(a). Step two is appellant's petition to the EEOC to consider the Board's interpretation

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1/ Although the majority bases its decision on the assumed legitimacy of the inquiry whether the Commission decision actually was controlled by a question of civil service law, and, thus, whether the Board properly certified the case, that analysis is clearly at odds with the majority opinion at n.5:

> The decision to certify a matter to the Panel rests with the MSPB, and is dependent on its findings, without regard to the validity of the MSPB's findings.

of the Title VII issue only. 5 U.S.C. § 7702(b). If the Commission determines that the Board's interpretation of Title VII is incorrect, then in step three, the case is automatically referred to the Board for further consideration. Id. At this point, the Board has two options. It may concur in the Commission's decision in whole, or it may conclude that the Commission incorrectly interpreted a matter of Title V law. Only if the Board makes the latter determination does the case proceed to step four - automatic certification to the Panel. 5 U.S.C. § 7702(c).

Therefore, for the Special Panel ever to have an issue for adjudication, each agency must have concluded that the other has decided an issue which directly or indirectly conflicts with its interpretation of the law within its respective expertise. Since there have necessarily been conflicting interpretations, the Panel has the statutory responsibility to decide the underlying substantive issues, giving deference to the respective agencies' expertise. This is consistent with the legislative history referenced by the majority, which clearly requires parity in Panel consideration of the respective Commission and Board decisions.

Under the statutory process, in making the second and third decisions, there is no occasion for the Commission or the Board to use as its "necessary premise" the substantive law of the other agency. However, the adjudication of mixed cases inevitably results in direct or indirect impact beyond an agency's area of primary expertise. In my view, the Congressional concern in creating the Panel was not that the Commission and/or the Board would deliberately overreach at the second and third levels, by making interpretations within the other's area of expertise. Rather, Congress recognized the inherent tension between Titles V and VII, and provided the Panel as a means of resolving disputes.

The majority's examination of the merits of the certification, however, precludes it from ever reaching the merits of the underlying substantive dispute(s) between the Commission and the Board.2/ The majority comes to the baffling conclusion that, although the Commission was substantively wrong in its analysis of Title V, the Board's "assertion that the Commission's decision constitutes an incorrect interpretation of civil service law is in error." (Page 19.) The majority attempts to bridge these conflicting statements through its conclusion that "[d]ispositive reliance on civil service law is absent [from the Commission decision]." (Page 20.)

The majority impermissibly analogizes its "dispositive reliance" jurisdictional test to the Director of OPM's authority to seek judicial review of Board decisions under 5 U.S.C. §7703(d). This section, however, clearly requires two separate tests: first, there must have been a misinterpretation of civil service law, rule, regulation or policy directive; and, secondly, such misinterpretation must have a substantial impact on civil service law. It is not surprising, therefore, that the decisions of the Court of Appeals for the Federal Circuit referenced by the majority require a "substantial impact". See Devine v. Levin, 739 F.2d 1567 (1984); Devine v. Sutermeister, 733 F.2d 892 (1984). However, Section 7702 does not contain any analogous prerequisite. Also, 5 U.S.C. § 7701(d) provides the OPM Director the right to seek intervention. Again, this right is predicated upon a two-part test: a misinterpretation, and substantial impact. Rather than supporting a requirement of "dispositive reliance", Sections

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2/ Further adding to the confusion is the majority's lack of clarity with respect to what constitutes the "merits" of a decision regarding an "issue in dispute". The majority states that the question of the correctness *vel non* of the Commission's Title V decision is a "merits" consideration. (Page 9.) This same question is distinguished from the "merits" in the standard of review outlined on pages 17-18.

7701(d) and 7703(d) conclusively demonstrate that Congress could have added such a requirement but chose not to do so.

The majority has, by fiat, invented a jurisdictional requirement of "dispositive reliance" without any statutory predicate, thereby erroneously insulating the Commission decision from review as to legal correctness.

When the majority finally "reviews" the "merits" of the Commission's Title VII decision, it finds, without any substantive analysis, that it is a "reasonable" conclusion. In essence, the majority's inquiry is limited to determining whether the Commission's decision was in fact based on Title VII. In my view, this is a wholesale abdication of the Panel's statutory responsibility.

The standard of review suggested by the majority ignores the parity accorded both agencies by the statute. The majority evaluates the Commission decision regarding Title VII under a test of "reasonableness", while the Board's Title V determination is subjected to a *de novo* consideration under a "correctness"-standard.

With all due respect to the majority, and fully recognizing the difficulty of the task, I find the majority decision-making model for the Panel to be utterly unworkable, clearly illustrating the need for legislative reform to correct the ambiguities and wasted motion inherent in the current process for resolving Commission/Board disputes under 5 U.S.C. § 7702.

II. THE ACCOMMODATION ISSUE

Since the underlying substantive issues are properly and necessarily before the Panel, I will set forth why the Commission decision is incorrect as a matter of both Title V and Title VII law.

A. Background

The Rehabilitation Act is the beginning point for determining the Postal Service's obligations, upon

concluding that Mr. Ignacio was unable to perform the essential duties of his letter carrier position. Insofar as relevant here, 29 U.S.C. §501 provides very little guidance:

> **(b) Federal agencies; affirmative action plans**
> Each department, agency and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall, within one hundred and eighty days after September 26, 1973, submit to the Office of Personnel Management and to the Committee an affirmative action program plan for the hiring, placement and advancement of handicapped individuals in such department, agency or instrumentality. . . .

Initial responsibility to enforce this section rested with the former Civil Service Commission and was transferred to the Commission in 1978. Ex. Ord. No. 12106, Dec. 28, 1978, 44 F.R. 1053.

The relevant implementing regulations require an agency to make "reasonable accommodation to the known physical or mental limitations of a qualified handicapped . . . employee" unless it can show that the accommodation would impose "an undue hardship on the operation of its program." 29 C.F.R. §1613.704(a). Ignacio had a known handicapping condition, forming the basis for his removal. The question is whether appellant was a "qualified handicapped person" as defined at 29 C.F.R. § 1613.702(f):

> . . . a handicapped person who, with or without reasonable accommodation, can perform the essential functions <u>of the position in question</u> without endangering the health and safety of the individual or others . . . .(Emphasis supplied.)

The dispositive issue before this Panel under 5 U.S.C. § 7702(d)(1)(A) is whether the "position in question" includes positions other than the one from which appellant

was removed.3/ If it does not, the Postal Service's obligation is to attempt to accommodate Ignacio in the letter carrier position. If it does, then, at a minimum, the Postal Service must consider reassigning him to a different position, perhaps across craft lines. To borrow the conclusion of the Commission, the "possible means of accommodation [are] infinite" under the latter construction. Commission Dec. at 12.

B. The majority gives undue deference to the Commission decision

Title 5, Section 7702 mandates that this Panel accord "due deference" to the respective expertise of the Commission and the Board in making its decision. The majority pre-empts that statutory requirement, however, by misinterpreting "issues in dispute". As discussed above, the majority applies a test of "reasonableness" for Commission decisions, and a test of legal "correctness" for Board decisions. Assuming, *arguendo*, the Panel's proper approach to "issues in dispute", however, I respectfully submit that deference to the Commission decision is inappropriate here for at least three reasons.

First, by statute, deference is predicated upon expertise. Here, contrary to the majority's conclusion, the Commission decision lacks any legislative, regulatory, or judicial authority supporting its construction of 29 C.F.R. Part 1613, other than Office of Personnel Management ("OPM") policy guidelines. The Commission decision lacks any

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3/ The question before this Panel is not whether reassignment of handicapped employees is good policy from a social or economic standpoint. That issue is beyond the charter or the competence of this Panel. Our function is to decide what the Rehabilitation Act and its implementing regulations require, not what they might have required if written differently.

Conversely, a determination that consideration of reassignment is not required would certainly not preclude an agency from considering reassignment, or from independently obligating itself by regulation or collective bargaining agreement to do so.

analysis of the legislative history of the Rehabilitation Act or that surrounding the adoption of the implementing regulations -- areas in which the Commission admittedly would have expertise. There is no parsing of the relevant regulatory language or recitation of historical construction by the Commission. Sweeping generalizations that the Rehabilitation Act is "remedial", and that the federal government should be a model employer remain unexplained and are simplistic. The specific support relied on -- the OPM policy guidelines -- is the very aspect of the Commission decision which the majority concludes provides jurisdiction to this Panel because the Commission interpretation clearly intrudes upon Title V, an area in which the Board has greater expertise. For this reason, if no other, the majority's *carte blanche* deference to the Commission's decision is inappropriate.

Second, deference is inappropriate under normal rules of statutory construction:4/ 1) The regulations at issue were not drafted by the Commission. They were originally promulgated by the former Civil Service Commission in 1978, and were adopted later that year by the Commission. 2) The Rehabilitation Act and the implementing regulations are relatively new. They do not have a long history of agency construction. Other than the Commission's decision in the case at bar, I am unaware of any previous agency interpretation of 29 C.F.R. §1613.702(f) which is directly on point. Thus, the Commission's construction herein was not contemporaneous with the promulgation of the regulations.5/ 3) Finally, as the Supreme Court cautioned in International Brotherhood of Teamsters v. Daniel, 439

4/ Regulations are subject to the same rules of statutory construction as statutes. See Sutherland, Stat. Const. §31.06 (4th Ed.).

5/ I am aware that several agencies voluntarily have adopted regulations undertaking the obligation which the Commission advocates under the Rehabilitation Act. Obviously, such actions would not be necessary if the Commission's interpretation were correct.

U.S. 549, 566 n.20 (1979), deference is constrained by the obligation to honor the clear meaning of the written word. As pointed out below, there is not sufficient ambiguity in the regulation to condone the Commission's massive insertion in which this Panel has erroneously concurred.

Finally, and perhaps most telling, it would have been a simple matter for the former Civil Service Commission, in promulgating its regulations, to have set forth a clear requirement regarding consideration of reassignment as a reasonable accommodation. By following the requirements of the Administrative Procedure Act, 5 U.S.C. § 551 et seq., the Commission would have publicly explained its rationale, and the community of agencies, individuals, and groups affected by such a sweeping proposal would have had opportunity to comment and/or seek judicial review. It defies logic or credibility to conclude that the Commission would have left such an important shift in agency obligations, and concomitant establishment of employee rights, to the vagaries of administrative construction on a case-by-case basis.

In sum, assuming a parity between the Commission and the Board, which clearly does not exist in the majority's approach, deference is due the Board determination that a civil service law, rule or regulation has been incorrectly interpreted, and is, therefore, "in dispute". No deference is due, however, the Commission's conclusion that the Rehabilitation Act and its implementing regulations require consideration of reassignment as an accommodation.

C. <u>The term "position in question" may not be read to include positions other than the one encumbered</u>

The Panel is not without reference points in defining the term "position in question" contained in 29 C.F.R. § 1613.702(f). The most important is the very context of this action -- a removal under 5 U.S.C. §7702 from a specific position, here, letter carrier. Appellant's affirmative defense of handicap discrimination should not obscure the

fact that the ultimate burden of proof lies with the Postal Service. It must show by preponderant evidence that appellant's removal from his position of record promotes the efficiency of the service. This removal did not occur in a vacuum. It was based entirely on appellant's admitted inability to perform the essential functions of his letter carrier duties. It is impossible to separate appellant's handicap defense from the question whether he was able to perform the essential duties of that position. Any defense predicated upon another position simply does not respond to the agency's case-in-chief.

It is fundamental in any Title V action that an employee's rights are based on his position of record. Sections 7513, 7701, and 7702 of Title 5 under which the Postal Service proceeded, are the source of appellant's substantive and procedural rights, including the right to assert a defense under the Rehabilitation Act. See 5 U.S.C. § 2302 (b)(1)(D). In Bierke v. Department of Education, 25 M.S.P.R. 310 (1984), the Board held that in a reduction in force, an employee's rights are based on the position of record, not on a currently held detail position. In Cortes v. Department of Interior, 26 M.S.P.R. 88 (1985), the Board held that it was improper to remove a detailee based on his performance in the detail position rather than the position of record .

When examined in the context of a Title V removal, therefore, the term 'position in question' logically can only refer to the position from which the incumbent is being removed for inability to perform the essential functions of his position of record.

Given this context, the choice of the singular "position", rather than "positions", is conclusive. When drafting the regulation, the Civil Service Commission intended agency accommodation of an employee in one position -- obviously the one from which the employee is being removed. The notion that by some legerdemain the

singular term incorporates the concept of an "infinite" number of possible accommodations is simply untenable.

The patent illogic of the majority's view is reflected in the short shrift given this question by each of the courts which has addressed this issue since issuance of the Commission decision.

Most directly on point is Carty v. Carlin, CV-N-84-4565 (D. Md. December 18, 1985), also involving the Postal Service. The issue was identical to that before this Panel:

> . . . the only remaining issue is whether the defendant owed to the plaintiff the obligation to reassign him to another job as a reasonable accommodation. . . .
> . . . the issue to be addressed is whether the phrase "position in question" is to be limited to the then present position occupied by the plaintiff or whether it may refer to another position within the agency. Slip Op. at 17-18.

After considering precisely the same statutory and regulatory grounds for allegedly requiring reassignment, the court concluded:

> . . . . There is nothing in the law or accompanying regulations to suggest that reasonable accommodation requires an agency to reassign an employee to another position. Id. at 19.

What the Carty court found lacking is certainly not supplied by the Commission or the majority opinion.

Other courts have also come to the same conclusion. Although Alderson v. Postmaster General, 598 F. Supp. 49 (W.D. Okla. 1985), turned ultimately on a different point, the court addressed the question whether the term "position in question" was limited to the position held:

> But there is nothing in that regulation which requires reassignment to a different job. . . . The quoted regulation [29 C.F.R. §1613.702] clearly refers to making the particular job, not another job . . . accessible to handicapped persons. Id. at 55.

Similarly, in Jasany v. United States Postal Service, 33 FEP 1115 (N.D. Ohio, 1983), aff'd on other grounds, 755 F.2d 1244 (6th Cir. 1985), the court succinctly rejected the Commission's interpretation of Section 1613.702(f):

> The requirement of 'accommodation' refers to adjustments within the job for which the handicapped individual was hired. Id. at 1117.

That three courts have now come to the same conclusion as the Board seriously undercuts the Commission's construction, as candidly admitted by the majority. See n. 16.

Both Carty and Alderson point to the wording of 29 C.F.R. Part 1613, specifically focusing on the fact that subsection 704(b) defines reasonable accommodation in terms of enumerated actions which do not include reassignment. It is significant that, although the list is not exclusive, none of the suggested accommodations extends beyond the position encumbered. Fundamental principles of statutory construction mandate that the unenumerated accommodations be of the same type as those listed -- i.e., limited to the position held. See Sutherland, Statutory Const. § 47.17 (4th Ed.). See generally, Owen of Georgia, Inc. v. Shelby County, 648 F.2d 1084 (6th Cir. 1981); National Distributing Co. v. United States Treasury Department, 626 F.2d 997 (D.C. Cir. 1980).

D. The Commission over-reads the statute

The Commission's decision asserts that remedial statutes should be broadly construed to effectuate their drafters' intent. That principle cannot be invoked, however, to create substance where none otherwise exists, or to add to a clearly drafted statute or regulation.

It is important to remember the instruction given by the Supreme Court with respect to the role of the judiciary in construing a regulation or statute. In Southern Pacific Transportation Co. v. Commercial Metals Co., 456 U.S. 336

(1982), the Supreme Court was asked to affirm a finding that certain ICC regulations permitted an affirmative defense:

> We view the absence of any provision for an affirmative defense in the ICC's credit regulation as an administrative construction of the statute that aids our determination of congressional intent. "[L]egislative silence is not always the result of a lack of prescience; it may instead betoken permission or, perhaps, considered abstention from regulation. . . . Accordingly, caution must temper judicial creativity in the face of legislative or regulatory silence." Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565 . . . (1980). We so regard the administrative silence here. When an administrative agency historically has engaged in comprehensive regulation of an industry's credit practices, the agency's silence regarding an affirmative defense based on a violation of those regulations must be deemed significant.

In Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 (1980), relied upon in Southern Pacific, the Court also reminded judges that although they must decide unanticipated cases, and thus fill in "interstitial" silences within a regulation, they are nonetheless "not accredited to supersede Congress or the appropriate agency by embellishing upon the statutory scheme." Id. at 565.

In other federal employment contexts, Congress and agencies have specifically and clearly articulated employees' entitlements regarding other positions. For example, during a reduction in force, employees have very specific and precisely delimited rights to compete for other positions. See 5 U.S.C. §§ 3501 et seq.; 5 C.F.R. Part 351. Also, 5 U.S.C. § 3321(b) provides that an employee who does not satisfactorily complete the probationary period for reasons of deficient supervisory performance is entitled to be assigned to a position of no lower grade or pay, in lieu of removal. Under 5 U.S.C. § 3594, career SES appointees who fail to perform satisfactorily are entitled to be placed in GS-15 positions. Similarly, 5 U.S.C. § 8337(a) conditions disability retirement, in part, upon the agency showing that

it is unable to reassign the applicant within defined criteria.

Clearly, Congress and regulatory agencies have been very specific regarding employee rights to other positions in different contexts. It is unreasonable to conclude that silence on the matter before the Panel should nonetheless be construed as an indication that consideration of reassignment is required.

E. The OPM policy guidelines do not support the Commission's position

One of the documents cited by the Commission is OPM's Handbook of Reasonable Accommodation. However, the context of the portion relied upon, "Reassigning and Retraining Employees", at 10, does not relate to a Title V removal, but to disability retirement, as made clear in its introduction. That it suggests reassignment is hardly surprising, in view of the mandate of 5 U.S.C. §8337(a), which conditions disability retirement upon a showing that an employee cannot be reassigned within specified criteria. Interestingly, that section specifically excepts cross-craft reassignments within the Postal Service -- the very remedy Ignacio seeks.

The Commission also relied upon the Handbook of Selective Placement, again relating to disability retirement under Section 8337. The relevant passage is entitled, "An Alternative to Disability Retirement", and begins with the suggestion that "[s]elective placement is an alternative to disability retirement." Id. at 17. It further provides that when "the issue is disability retirement versus reassignment, the employee should be given a balanced presentation of the advantages and disadvantages of each course of action." Id. at 18. This suggestion is entirely consistent with the Board's position here. Plainly an agency has the option of exploring the possibility of

reassignment with an employee who requests disability retirement.

More on point are Federal Personnel Manual ("FPM") Ch. 339, Subchapter 1-3 (October, 1974), drafted by the Civil Service Commission prior to drafting 5 C.F.R. Part 713, subpart G, the predecessor to 29 C.F.R. Part 1613, subpart G, and FPM Letter 751-2 (February 4, 1983). Both of these publications refer to reassignment as a possible means of avoiding separation for physical inability. Significantly, however, neither purports to define "position in question" or "reasonable accommodation". Rather, as pointed out by the then Director of OPM, the FPM Letter was published by OPM (or the Civil Service Commission) "for the convenience of Federal managers, and plainly is not binding." See letter from Donald J. Devine to the Board dated January 8, 1985. Appendix I, Certification Order. That it may be good management in a given situation to consider reassigning a handicapped employee is a far cry from the legal rights created by the Commission and the Panel majority.

III. CONCLUSION

The Panel's decision, adopting *carte blanche* the Commission's decision, denigrates the statutorily required parity with which Commission and Board opinions are to be considered by the Panel. Essentially, this Panel has done little more than rubber stamp the Commission's erroneous administrative activism. Congress rightfully expected more from the Panel's deliberative process.

DATED: February 27, 1986 Herbert E. Ellingwood

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