Case Title : JAMES C. LATHAM v. UNITED STATES POSTAL SERVICE

Docket Number : DA-0353-10-0408-I-1

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Docket # DA-0353-10-0408-I-1
Agency's Reply Brief
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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JAMES C. LATHAM,
RUBY N. TURNER,
ARLEATHER REAVES,
CYNTHIA E. LUNDY, and
MARCELLA ALBRIGHT,

Appellants,

v.

UNITED STATES POSTAL SERVICE,

Agency.

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Table of Contents

SUMMARY OF ARGUMENT	1
ARGUMENT	3
A. THE BOARD LACKS JURISDICTION UNDER FECA TO ENFORCE AGENCY RULES THAT PROVIDE ASSIGMENTS TO PARTIALLY RECOVERED WORKERS OR THAT PROVIDE ASSIGNMENTS OTHER THAN TO REGULAR POSITIONS.	3
B. THE EMPLOYEE AND LABOR RELATIONS MANUAL AND HANDBOOK EL-505 HAVE HISTORICALLY BEEN INCORPORATED INTO THE POSTAL SERVICE'S COLLECTIVE-BARGAINING AGREEMENTS AND ENFORCED UNDER THEIR GRIEVANCE PROCEDURES. THE BOARD SHOULD NOT INVADE THE COLLECTIVE-BARGAINING RELATIONSHIP AND SHOULD DEFER ENFORCEMENT OF THE POSTAL SERVICE'S LIMITED DUTY RULES TO THE GRIEVANCE PROCEDURES AND EXPERIENCE AND EXPERTISE OF ARBITRATORS.	10
C. 5 C.F.R. § 353.301(d)'s REFERENCE TO THE THE REHABILITATION ACT SUPPORTS AN INTREPRETATION THAT § 353.301(d) ONLY REQUIRES PLACEMENT IN REGULAR POSITIONS. THE AMICI'S REFERENCES TO THE REHABILITATION ACT ARE EITHER MISLEADING OR IRRELEVANT TO THE ISSUE BEFORE THE BOARD.	12
D. THE OWCP RULES GOVERNING SUITABLE WORK AND GENERAL REHABILITATION EFFORTS ARE ANALYTICALLY INDEPENDENT OF FECA RESTORATION RIGHTS. THE BOARD SHOULD NOT EXPAND ITS JURISDICTION IN A WAY THAT WOULD INVADE THE PROVINCE OF THE OWCP AND DISRUPT AN ESSENTIAL FUNCTION OF FECA.	15
CONCLUSION	18

SUMMARY OF ARGUMENT

There is no dispute about the force or enforceability of the Postal Service's obligation under its collective-bargaining agreements, the Employee and Labor Relations Manual ("ELM") and Handbook EL-505, to search for and provide assignments to ill or injured workers who may not be fully recovered. But it is the substance of those obligations, and not their strength, that is relevant to the Board's inquiry. This is so because those rights transcend the civil service retention rights Congress provided under the Federal Employees' Compensation Act ("FECA"). FECA limits retention and restoration rights to regular positions and fully recovered workers. As a result, Postal Service rules and collective-bargaining agreements that either provide assignments to FECA claimants who are not fully recovered or provide assignments that are not to regular positions are not FECA retention or restoration rights that are enforceable by the Board. Such rights are independent of and supplemental to the rights granted by Congress under FECA, and, for the majority of the Postal Service's workers, they are enforceable through grievance procedures and ultimately by an arbitrator. To the extent 29 C.F.R. § 353.301(d) is read to grant retention or restoration rights under FECA to less than fully recovered workers or to assignments other than to regular positions, it exceeds its statutory authorization and cannot support the Board's exercise of jurisdiction.

The principle argument advanced by the amici and the appellants is in essence that because the provisions of the ELM and Handbook EL-505 are incorporated into the Postal Service's collective-bargaining agreements and are correspondingly enforceable as a matter of contract, they equate to restoration obligations under FECA. Put another way, because they involve the assignment of work to FECA claimants and are mandatory, they

are transformed into a FECA-based restoration right. As demonstrated here, those arguments miss the mark. The question before the Board is not whether the Postal Service rules must be followed or are enforceable. They must be and they are, as evidenced by the arbitration decisions referenced in the Board's Consolidation Order. The Board is concerned with whether it has jurisdiction to enforce the Postal Service's rules under FECA. It does not.

To the extent the appellants, the amici, or the Office of Personnel Management attempt to argue that the Board has jurisdiction over the Postal Service, their arguments are both unsupported by any authority and ignore the fundamental issue before the Board – that exercising jurisdiction over the Postal Service rules under consideration is directly inconsistent with the Board's statutory authority under FECA.

Even if the Board had jurisdiction over assignments to partially recovered workers, assignments to other than regular positions, or both, it would be imprudent and unnecessary to disturb the administration and enforcement of such assignments because the OWCP and the Postal Service's grievance and arbitration mechanisms are effectively and efficiently enforcing them today.

Pleading Number [redacted] Submission date : 2011-09-13 09:49:07 Confirmation Numbe[redacted] page 7 of 25

ARGUMENT

A. THE BOARD LACKS JURISDICTION UNDER FECA TO ENFORCE AGENCY RULES THAT PROVIDE ASSIGMENTS TO PARTIALLY RECOVERED WORKERS OR THAT PROVIDE ASSIGNMENTS OTHER THAN TO REGULAR POSITIONS

The issue raised by the Board in these cases concerns its jurisdiction under FECA. It has asked the parties, the amici, and the Office of Personnel Management to address whether, in the case of partially recovered employees, the Board has "jurisdiction over a restoration appeal under [5 C.F.R. § 353.304(c) to enforce 5 C.F.R. § 353.301(d)] merely on the basis that the denial of restoration violated the agency's own internal rules?" Consolidation Order 4. The Postal Service "internal rules" at issue are the Employee and Labor Relations Manual ("ELM"), Handbook EL-505, and the Postal Service collective-bargaining agreements that incorporate them. As the Postal Service explained in its opening brief, and as every other brief agrees, these rules grant rights to partially recovered workers and rights to assignments that are other than regular positions.

The Postal Service demonstrated in its opening brief that 5 C.F.R. § 353.301(d) on its face exceeds its statutory authorization because it purports to grant restoration rights under FECA to partially recovered workers when FECA grants restoration rights only to fully recovered workers. What's more, even if FECA did grant restoration rights to partially recovered workers, it is clear that the restoration rights granted by FECA to any worker are limited to regular positions. To the extent 5 C.F.R. § 353.301(d) is read to apply to other than fully recovered workers, to assignments other than to regular positions, or to both, it is inconsistent with FECA and cannot support Board jurisdiction. As a result, and for the reasons explained in the Postal Service's opening brief, the

Pleading Number [redacted] Submission date : 2011-09-13 09:49:07 Confirmation Numb[redacted] page 8 of 25

benefits provided in the Postal Service's internal rules under consideration in this case transcend the restoration rights guaranteed by FECA and are not enforceable by the Board.

The briefs of the amici and the appellants do not directly address 5 C.F.R. § 353.301(d)'s ultra vires nature and resulting jurisdictional flaws. Instead, they exhort the Board to enforce the Postal Service's rules under the mantle of FECA based on two general principles:

- An agency must follow its own rules; and
- The Board's precedent establishes its authority to enforce agency rules.

The first principle is axiomatic and unassailable in general, but it is unrelated to the issue here – whether the Board has jurisdiction under FECA to enforce the Postal Service's rules concerning the assignment of partially recovered workers to other than regular positions.[1] The second principle is an incomplete expression of the authority cited in its support. What the various cited authorities actually reveal is that the Board will enforce agency rules when their enforcement is ancillary to the fundamental claim over which the Board's jurisdiction independently exists. Here, the Board's jurisdiction depends directly on the regulations it would enforce.

This mischaracterization of the Board precedent is most prominently displayed in the Brief of the National Postal Mail Handlers Union ("NPMHU Brief"). In addition to overlooking the fundamental jurisdictional defects in 5 C.F.R. §§ 353.301(d) & .303(c), the NPMHU Brief embellishes the authority it cites to suggest a precedent for

[1] Several briefs devote substantial effort to describing the relevant provisions of the ELM, Handbook EL-505, and the Postal Service collective-bargaining agreements. By and large, they restate the description contained in the Postal Service's opening brief. There is no material dispute concerning the content of these documents and in particular what the Postal Service has said it will do. The issue is whether they comprise rights under FECA that the Board has jurisdiction to enforce.

Pleading Number [redacted] Submission date : 2011-09-13 09:49:07 Confirmation Number [redacted] page 9 of 25

Board jurisdiction. In each case cited in the NPMHU Brief, jurisdiction was not an issue and was not itself based on the agency regulation being enforced by the Board. In *Campbell v. United States Postal Service*, 75 M.S.P.R. 273 (1977), the Board considered Postal Service back pay regulations to determine damages arising out of an improper demotion. Its jurisdiction was based on the general appellate jurisdiction conferred by chapter 75 of title 5. In *Giesler v. Department of Transportation*, 3 M.S.P.R. 277 (1980), the Board considered Federal Aviation Administration collectively-bargained discipline procedures to determine whether harmful procedural error was committed under 5 U.S.C. § 7701 (c)(2). Its jurisdiction was based on the general appellate jurisdiction conferred by chapter 75 of title 5. In *Miller v United States Postal Service*, 105 M.S.P.R. 89 (2007), the Board considered Postal Service military leave rules to determine if they were applied in a manner consistent with the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). Its jurisdiction was based on its general authority to consider allegations of USERRA violations granted by 38 U.S.C. § 4324. And in *Ricketts v. United States Postal Service*, 94 M.S.P.R. 257 (2003), the Board considered Postal Service collectively-bargained rules to determine the appropriateness of back pay in an appeal of an indefinite suspension without pay. Its jurisdiction was based on chapter 75 of title 5.

Assigned their true significance, these cases are unhelpful to the resolution of the instant question. When the Board has jurisdiction, it can generally examine agency conduct, particularly when the Board's jurisdiction is based on chapter 75, which gives the Board plenary authority to review the overall circumstances of the agency action. *Cf. Bodus v. Department of the Air Force*, 82 M.S.P.R. 508. at ¶¶ 14 -16 (1999). In the cases

cited above, jurisdiction to enforce an agency rule was never based on the rule itself and was never in doubt. In this case, the jurisdiction being considered by the Board would be based entirely on the existence of Postal Service's rules it would be enforcing under FECA. In summary, this argument amounts to a contention that the Postal Service can unilaterally amend FECA by expanding Congress' limited grant of restoration rights and thereby grant jurisdiction to the Board to enforce those rights.

The Brief of the National Association of Letter Carriers, AFL-CIO ("NALC Brief") makes a similar argument but suffers from similar analytical flaws.[2] It cites *Kachanis v. Dep't of Treasury*, 212 F.3d 1289 (Fed. Cir. 2000), for the proposition that "an agency's own policy or regulations regarding the filling of vacancies supersedes the [OPM] regulations to the extent they afford greater rights." *Id.* at 1296. But *Kachanis* dealt with a fully recovered employee who was challenging the agency's failure to assign him to a regular position under the Reemployment Priority List rules in 5 C.F.R. § 330 and related agency rules. Those circumstances fell within the restoration rights granted by FECA, and they presented a situation that is reviewable by the Board under an independent grant of jurisdiction, 5 C.F.R. § 330.209. In addition, the § 330 regulations permit agencies to substitute placement procedures for those contained in the regulations themselves, but retain Board jurisdiction to review compliance with the alternate system. Indeed, that was what happened in the case cited by the *Kachanis* court, *Struck v. Dep't of the Navy*, 72 M.S.P.R. 153 (1996). So, like the authority cited above, the Board's

[2] Several other briefs implicitly or expressly contain a similar contention – that the Board has general authority to enforce agency rules, and that authority supports jurisdiction under 5 C.F.R. § 353.304(c) based solely on the Postal Service's rules governing partially recovered workers and assignments other than to regular positions. *See* Brief of Amicus George Reyes, Brief of Appellant Arleather Reaves, Brief of Appellant Marcella Albright.

jurisdiction in *Kachanis* was not at issue, and was not based on the very regulations it sought to enforce.

The Board has also received an opinion from the Office of Personnel Management ("OPM") which generally concludes that an agency would violate 5 C.F.R. § 353.301(d) "if it failed to comply with agency's own internal rules in connection with denying restoration to a partially recovered individual." OPM Advisory Opinion 1 (emphasis added). With respect, OPM's opinion is simply unreliable and unhelpful to the Board's consideration of its jurisdiction under 5 C.F.R. § 353.304 (c).

OPM's opinion is most deficient because: a) it assumes that 5 C.F.R. § 353.301(d)'s coverage of partially recovered employees is authorized by FECA, and; b) it ignores the circumstances that are at the heart of the Board's jurisdictional concern – whether an agency rule that provides "medically suitable work to partially recovered employees regardless of whether that work comprises the essential functions of a complete and separate position" is enforceable by the Board as a restoration right under FECA. Consolidation Order 3 (emphasis added). OPM's opinion claims that 5 C.F.R. § 353.301(d) was adopted under its "authority" under FECA, 5 U.S.C. § 8151(b), but it does nothing to explain or rationalize how it could have adopted a regulation granting FECA restoration rights to partially recovered employees, a right that is not authorized by FECA itself, which limits restoration rights to fully recovered employees. And it fails to address how a Limited Duty assignment under the Postal Service' rules (by definition work that is not a regular position) fits within FECA's limitation to assignments to regular positions. Indeed, on the latter point, the OPM opinion creates confusion because it uses the term "restoration rights" – presumably a reference to the rights granted by

FECA at 5 U.S.C. § 8151(b) – to describe the rights granted by the Postal Service rules that provide Limited Duty assignments. These features of the OPM opinion confuse, not clarify, the jurisdictional issues under consideration by the Board.

OPM's opinion cites three cases it found instructive, but these cases merely stand for the general proposition that the federal courts have jurisdiction to require agencies to follow their own procedural rules, even when the agencies were not compelled to adopt them. *See Service v. Dulles*, 354 U.S. 363, 373-76 (1957); *Vitarelli v. Seaton*, 359 U.S. 535, 545 (1959); *Lopez v. Federal Aviation Administration*, 318 F.3d 242, 246-47 (D.C. Cir. 2003). The third case cited by OPM, *Lopez v. Federal Aviation Administration*, actually discusses *Service v. Dulles* and *Vitarelli v. Seaton* and confirms this analysis. The court intended to flesh out the principle that "federal agencies are required to 'follow their own rules, even gratuitous procedural rules that limit otherwise discretionary actions.'" *Lopez*, 318 F.3d at 246 (citing *Steenholdt v. Federal Aviation Administration*, 314 F.3d 633, 639). As with the theories advanced by the amici, apart from the questionable basis for OPM's assertion, it is a red herring. The Board is not focused on whether the Postal Service must follow it regulations or whether they are enforceable. The issue here is whether certain Postal Service regulations provide rights under FECA that can be enforced by the Board.

The OPM opinion notes that OPM's interpretation of its own rules is entitled to substantial deference, citing *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994). *Shalala* discussed a situation where deference was paid to an administrative interpretation of a regulation in the face of conflicting views of the meaning of the regulation itself. Here, the issue is whether OPM's FECA restoration regulations, either

on their face or as interpreted, exceed the statutory authority on which they are based to the extent they grant FECA restoration rights to partially recovered employees or to assignments other than to regular positions. No interpretation by OPM is necessary on the former point. The regulations on their face apply to partially recovered employees, a fact that makes them unenforceable because they exceed FECA's own restoration provisions. And assuming OPM has opined that assignments other than to regular positions under Postal Service rules amount to restoration rights under FECA, that interpretation renders the regulation similarly unenforceable because FECA does not authorize a right to any assignment other than to a regular position.

The Board is, of course, the final arbiter of its own jurisdiction. In this case, and given the glaring inconsistencies between FECA and the OPM regulations concerning partially recovered employees and assignments other than to regular positions, the Board must look to the statute. As noted in the Postal Service's opening brief, the Board must presume that Congress said what it meant and meant what it said in 5 U.S.C. § 8151(b). *See BedRoc Limited, LLC v. United States*, 541 U.S. 176, 183 (2004).

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, U.S.A. v. National Resources Defense Council, 467 U.S. 837, 842-843 (1984)(footnotes omitted). As noted above, the question before the Board is not whether the Postal Service rules must be followed or may be enforced. They must be followed and they may be enforced, most notably through the binding grievance procedures in the Postal Service collective-bargaining agreements. The question before the Board is whether the Board has jurisdiction under FECA to enforce Postal Service rules providing assignments to partially recovered employees, or assignments to any employees when the assignments are to perform work that is other than a regular position. The text and history of FECA make clear that it does not. Nothing offered by the amici, the appellants, or OPM does anything to place this conclusion in doubt.

B. THE EMPLOYEE AND LABOR RELATIONS MANUAL AND HANDBOOK EL-505 HAVE HISTORICALLY BEEN INCORPORATED INTO THE POSTAL SERVICE'S COLLECTIVE-BARGAINING AGREEMENTS AND ENFORCED UNDER THEIR GRIEVANCE PROCEDURES. THE BOARD SHOULD NOT INVADE THE COLLECTIVE-BARGAINING RELATIONSHIP AND SHOULD DEFER ENFORCEMENT OF THE POSTAL SERVICE'S LIMITED DUTY RULES TO THE GRIEVANCE PROCEDURES AND EXPERIENCE AND EXPERTISE OF ARBITRATORS.

Several of the amicus briefs emphasize a point contained in the Postal Service's opening brief. As the APWU Brief explains, "[w]ith respect to the question of the [Postal Service's] restoration obligation[3] under the ELM, it is important for the Board to recognize that this is fundamentally a contract question, that the ELM and [Handbook EL-505] cannot conflict with and must be read in harmony with any applicable collective bargaining agreement, and that the application of the ELM may require the interpretation and application of more than one collective bargaining agreement." APWU Brief at 18.

[3] Of course, the Postal Service disagrees with the characterization of the provisions of the ELM as "restoration obligations" to the extent it implies that they are enforceable under FECA.

Pleading Number [redacted] Submission date : 2011-09-13 09:49:07 Confirmation Number [redacted] page 15 of 25

The APWU, NALC, and NPMHU make clear that the interpretation and enforcement of the ELM and Handbook EL-505 have historically been in the efficient and forceful hands of the parties' collective-bargaining relationships and respective grievance procedures. Indeed, beyond the fact that the ELM is incorporated into the collective-bargaining agreements, the amici point out that the current version of the ELM was influenced bilaterally by a grievance settlement between the Postal Service and the NALC. *See, e.g.*, NPMHU Brief at 8. The rights of Postal Service workers to Limited Duty assignments provided under the ELM and Handbook EL-505 have been crafted and are being enforced in the context where enforcement makes the most sense – the parties' collective-bargaining relationships.

Postal Service labor relations are unique in the federal sector in that they are subject to the National Labor Relations Act ("NLRA") and the federal labor policy it embodies. *See* 39 U.S.C. § 1209(a). Under the NLRA,

> [a]rbitration as a means of resolving labor disputes has gained widespread acceptance over the years and now occupies a respected and firmly established place in Federal labor policy. The reason for its success is the underlying conviction that the parties to a collective-bargaining agreement are in the best position to resolve, with the help of a neutral third party if necessary, disputes concerning the correct interpretation of their contract.

United Technologies Corporation, 268 N.L.R.B. 557, 558 (1984). In recognition of this federal preference for arbitration, the National Labor Relations Board established criteria for deferring the resolution of statutory rights under the NLRA to a grievance procedure. The seminal case is *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971).

> The *Collyer* majority articulated several factors favoring deferral: The dispute arose within the confines of a long and productive collective-bargaining relationship; there was no claim of employer animosity to the employees' exercise of protected rights; the

Pleading Number: [redacted] Submission date : 2011-09-13 09:49:07 Confirmation Number: [redacted] page 16 of 25

> parties' contract provided for arbitration in a very broad range of disputes; the arbitration clause clearly encompassed the dispute at issue; the employer had asserted its willingness to utilize arbitration to resolve the dispute; and the dispute was eminently well suited to resolution by arbitration.

United Technologies, 268 N.L.R.B at 558.

Even if the Board had jurisdiction under FECA to enforce the ELM and Handbook EL-505, it should adopt a *Collyer*-like policy of deferral to the grievance machinery in the Postal Service's collective-bargaining agreements. Each of the *Collyer* criteria is present with respect to the relevant provision of the ELM and Handbook EL-505. In any grievance, it would necessarily be decided whether an employee was entitled to a Limited Duty assignment under the ELM and Handbook EL-505. That result would be conclusive on the question of whether the Postal Service acted arbitrarily or capriciously. It will either be found to have acted appropriately, or it will be ordered to provide an assignment. Indeed, as the Board's Consolidation Order discloses, there is already a substantial track record of successful enforcement of the Postal Service rules through the grievance procedure and arbitration.

C. 5 C.F.R. § 353.301(d)'s REFERENCE TO THE THE REHABILITATION ACT SUPPORTS AN INTREPRETATION THAT § 353.301(d) ONLY REQUIRES PLACEMENT IN REGULAR POSITIONS. THE AMICI'S REFERENCES TO THE REHABILITATION ACT ARE EITHER MISLEADING OR IRRELEVANT TO THE ISSUES BEFORE THE BOARD.

The brief of the Workers' Injury Law & Advocacy Group ("WILG Brief") comments on the Rehabilitation Act in ways that require contradiction or clarification.

The Rehabilitation Act prohibits federal sector employment discrimination based on disability. Although its history and content are not temporally or substantially

Pleading Number [redacted] Submission date : 2011-09-13 09:49:07 Confirmation Number [redacted] page 17 of 25

synonymous with the Americans with Disabilities Act ("ADA") -- which prohibits employment discrimination based on disability in the balance of the nation's workforce – Congress in 1990 unified the federal prohibition against employment discrimination based on disability by declaring that the "standards used to determine whether [the Rehabilitation Act] has been violated . . . shall be the standards applied under . . . the Americans with Disabilities Act." 29 U.S.C. § 791(g). As a result, the Rehabilitation Act relies on the ADA to inform its requirements.

One form of prohibited employment discrimination is the failure to reasonably accommodate an employee's disability. 42 U.S.C. § 12112(b)(5). When a disabled employee cannot perform his or her job, this feature of the ADA (and, therefore, the Rehabilitation Act) requires an employer to consider restructuring the job so that the employee can perform it. This requires consideration of changes to or elimination of job functions, but only those functions that are non-"essential." The obligation to reasonably accommodate is limited in this way because the right to be reasonably accommodated is enjoyed only by "qualified individuals," which means employees who "with or without reasonable accommodation, can perform the essential functions of the employment position" in question. 42 U.S.C. § 12111(8) (emphasis added). In most cases, an employer's obligation to reasonably accommodate a disability can be accomplished by altering a disabled employee's current position.

But when there is no reasonable accommodation that will permit an employee to perform the essential functions of his or her current position, there is another possibility an employer is obligated to consider. An employer must consider reassignment to vacant positions with respect to which the employee meets the "qualified individual" standard –

vacant positions whose essential functions can be performed, with or without a reasonable accommodation. Indeed, reassignment to a vacant position is specifically mentioned by Congress as an example of a reasonable accommodation. 42 U.S.C. § 12111(9)(b).

However, it is clear that an employer's obligation under the Rehabilitation Act stops there. An employer's reasonable accommodation obligation never includes the creation of a job for a disabled employee, *see* 29 C.F.R. pt. 1630 app. § 1630.2(o), Equal Employment Opportunity Commission Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act 19 (October 17, 2002) [hereinafter *EEOC Reasonable Accommodation Guidance*]. Similarly, an employer is never required to remove or "bump" another employee from a position to make way for a disabled worker, *Id. See also* S. Rep. No. 101-116, at 32 (1989).

Reassignment to a vacant position is not the preferred means of reasonable accommodation. The EEOC instructs that reassignment as a reasonable accommodation is a "last resort" and should be considered only after determining that there is not a reasonable accommodation that would allow an employee to remain in his or her current position. *EEOC Reasonable Accommodation Guidance 19.* Nevertheless, reassignment must be considered when a reasonable accommodation cannot otherwise be provided by altering or eliminating non-essential functions of the employee's original position.

These are the requirements of the Rehabilitation Act that have been incorporated into 5 C.F.R. § 353.301(d). In summary, the Rehabilitation Act only requires employers to make an effort to accommodate an employee in his or her current position and, if that

is not possible, search for regular positions that the employee can perform. The Board's authority recognizes these limitations. *See, e.g., Sanchez v. U.S. Postal Service*, 114 M.S.P.R. 345, ¶ 12 (2010). Indeed, by incorporating these Rehabilitation Act principles into 5 C.F.R. § 353.301(d), OPM was acting consistently with FECA's restriction of restoration rights to regular positions.

The WILC Brief suggests something to the contrary by contending that federal employers' reasonable accommodation obligation under the Rehabilitation Act requires that they afford opportunities to *assignments*, not positions. WILC Brief at 11 (emphasis in original), and that "[t]he only statutory limitation on the employer's obligation to provide a reasonable accommodation is undue hardship." *Id.* (footnote omitted). Presumably, the WILC Brief advances this contention to bolster its argument that assignments to other than regular positions are covered by 5 C.F.R. § 353.301(d). But the law is clearly against the WILC on this point. The Rehabilitation Act standards that have been incorporated into 5 C.F.R. § 353.301(d) only impose a requirement to accommodate employees in their current position or in another regular position.

D. THE OWCP RULES GOVERNING SUITABLE WORK AND GENERAL REHABILITATION EFFORTS ARE ANALYTICALLY INDEPENDENT OF FECA RESTORATION RIGHTS. THE BOARD SHOULD NOT EXPAND ITS JURISDICTION IN A WAY THAT WOULD INVADE THE PROVINCE OF THE OWCP AND DISRUPT AN ESSENTIAL FUNCTION OF FECA.

In its opening brief, the Postal Service outlined OWCP's rules concerning suitable work and its efforts to encourage interim assignments to light or limited duty, *see* Postal Service Opening Brief at 16-17, and urged the Board not to exercise jurisdiction over FECA restoration rights under 5 U.S.C. § 8151 in a way that might collide with OWCP's

Pleading Number [redacted] Submission date : 2011-09-13 09:49:07 Confirmation Number [redacted] page 20 of 25

responsibility for and approach to the administration of the portions of FECA under its jurisdiction.

The WILG Brief takes a contrary and implausible approach. It suggests with no authority that the OWCP regulations require that "positions" under FECA's restoration provision must be read to mean "any work within the employee's medical restrictions that the employee can perform with or without reasonable accommodation." WILG Brief at 23 (emphasis in original). For all the reasons presented in the Postal Service's opening brief, it would be analytically difficult and inappropriate as a matter of public policy for the Board to assert restoration jurisdiction under 5 U.S.C. § 8151 over limited and light duty assignment provided by employers in conjunction and cooperation with the OWCP's efforts to administer FECA. But beyond those considerations, the Board has already drawn the appropriate distinction between assignments provided under the OWCP rules and assignments to regular positions in the workforce, and it has done so in direct contradiction to the notion suggested in the WILG Brief.

In a substantially identical analytical context, the Board in *Ancheta v. Office of Personnel Management*, 95 M.S.P.R. 343 (2003), distinguished between assignments that may meet the suitable work requirements established by OWCP and "positions" within the meaning of the disability retirement eligibility rules found at 5 U.S.C. § 8337 (a). Coincidentally, *Ancheta* involved the Postal Service and required the Board to consider the effect of the same ELM and Handbook EL-505 provisions at issue here. In summary, the Board explained that an employee could only be denied disability retirement if he or she was offered a regular position in the employer's workforce, regardless of the fact that the employer had offered an assignment of some other kind, and even when the other

assignment fundamentally provided the employee with full employment. *Ancheta*, 95 M.S.P.R. 343, at ¶ 12. In *Ancheta*, the employee was offered a modified assignment under the provisions of Chapter 11 of Handbook EL-505, *see* Postal Service Opening Brief at 22-23, but the Board explained that a modified position did not comprise a regular position in the Postal Service's workforce such that it would disqualify an employee from disability retirement. *Ancheta*, 95 M.S.P.R. 343, at ¶ 10. In addition, the Board described the relevant provision of the ELM as follows: "[T]he matter in which Section 546 of the ELM describes the agency's obligations to employees who have partially overcome an injury or disability also suggests that work to which such employees may be assigned does not necessarily constitute the duties of a particular 'position' within the Postal Service." *Id.* at ¶ 11. *See also Bracey v. Office of Personnel Management*, 236 F.3d 1356 (Fed. Cir 2001); *Suter v. Office of Personnel Management*, 88 M.S.P.R. 80, at ¶ 7 (2001)(OWCP determination of suitable work not dispositive of whether appellant was offered a position within the meaning of disability retirement rules).

The OWCP rules satisfy a distinct and important FECA objective – to encourage interim assignments that are comprised of duties other than a regular position as a means of assisting the FECA claimant's recovery and reducing workers' compensation expense. If the Board were to transform such assignments into positions covered under FECA's restoration provisions, it would risk disrupting the OWCP's processes and the goals of FECA. And to do so would be inconsistent with the distinctions drawn by the Board in *Ancheta*, an analysis that demonstrates that statutory references to positions mean something other than Limited Duty assignments under the ELM and Handbook EL-505.

CONCLUSION

The Postal Service maintains substantial policies – incorporated into, and enforceable under, its collective-bargaining agreements – that provide important benefits to its workers with job-related illnesses or injuries. But their fundamental nature – providing assignments to partially recovered workers and assignments that are to other than regular positions – exclude them from the FECA restoration rights delineated by Congress in 5 U.S.C. § 8151. As a result, they are beyond the reach of OPM's restoration regulations and cannot confer jurisdiction on the Board under FECA.

Even if the Board did have jurisdiction under FECA to enforce the Postal Service's rules, the interplay of the Postal Service's rules with OWCP's administration of FECA and their incorporation into the Postal Service's collective-bargaining agreements strongly counsel in favor of deferring enforcement to the Postal Service's grievance and arbitration mechanisms.

Respectfully submitted,

William D. Bubb
Agency Representative

Certificate Of Service

e-Appeal has handled service of the assembled pleading to MSPB and the following Parties.

Name & Address	Documents	Method of Service
MSPB: Office of the Clerk of the Board	Agency's Reply Brief	e-Appeal / e-Mail
Marcella Albright Appellant	Agency's Reply Brief	e-Appeal / e-Mail
Thomas William Albright Appellant Representative	Agency's Reply Brief	e-Appeal / e-Mail
Earl L. Cotton, Sr., Esq. Agency Representative	Agency's Reply Brief	e-Appeal / e-Mail
Joshua T. Klipp, Esq. Agency Representative	Agency's Reply Brief	e-Appeal / e-Mail
Andrew C. Friedman, Esq. Agency Representative	Agency's Reply Brief	e-Appeal / e-Mail
Theresa M. Gegen Agency Representative	Agency's Reply Brief	e-Appeal / e-Mail
Ayoka Campbell Agency Representative	Agency's Reply Brief	e-Appeal / e-Mail

I agree to send a printed copy of the electronic pleading with attachments to non-efilers by the end of next business day, as follows:

Name & Address	Documents	Method of Service
James C. Latham Appellant [redacted]	Agency's Reply Brief	US Postal Mail
Ruby N. Turner Appellant [redacted] USA	Agency's Reply Brief	US Postal Mail

Arleather Reaves Appellant [redacted]	Agency's Reply Brief	US Postal Mail
Cynthia E. Lundy Appellant [redacted]	Agency's Reply Brief	US Postal Mail
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