UNITED STATES OF AMERICA
OFFICE OF PERSONNEL MANAGEMENT
WASHINGTON, DC 20415

Appellants: James C. Latham, Ruby N. Turner, Arleather Reaves, Cynthia E. Lundy, Marcella Albright, v. United States Postal Service, Agency.	M.S.P.B. Docket Numbers: DA-0353-10-0408-I-1 SF-0353-10-0329-I-1 CH-0353-10-0823-I-1 AT-0353-11-0369-I-1 DC-0752-11-0196-I-1 Date: 24 August, 2011

APPELLANT'S BRIEF REGARDING OPM'S ADVISORY OPINION

Pursuant to the Board's Request of 25 July, 2011, the Appellant responds to the primary question posed to OPM.

1. Does an agency act arbitrarily and capriciously under 5 C.F.R. § 353.301(d) in denying restoration to a partially recovered individual when such denial violates the agency's internal rules, such as the ELM?

The Board has taken the position that an agency's denial of restoration to duty to a partially recovered employee is not arbitrary and capricious provided that the agency had made a search for work within an employee's commuting distance (a radius of 50 miles). However, the Board's interpretation of § 353.301(d) is too narrowly construed. The search for work within a 50 mile radius is the least requirement that an agency must perform but not the only one; especially where the agency has its own regulations which must be considered. So narrow is the Board's interpretation that they have lost touch with the basic premise of what is meant by arbitrary and capricious.

Black's Law Dictionary (Abridged Sixth Edition) provides the following definitions: **Arbitrary**

In an unreasonable manner, as fixed or done capriciously or at pleasure. Without adequate determining principle; not founded in the nature of things; non-rational; not done or acting according to reason or judgment; depending on the will alone; absolutely in power; capriciously; tyrannical; despotic. Without fair, solid, and substantial cause, that is, without cause based upon the law. Willful and unreasoning action, without consideration and regard for facts and circumstances presented.

Caprice

Whim, arbitrary, seemingly unfounded motivation. Disposition to change one's mind impulsively.

It seems that the Board has so engrossed itself in the language of law that it has lost sight of the common sense application of the plain language.

The Board has already acknowledged that the Postal Service has internal regulations in place regarding providing work for an employee who has an accepted injured-on-duty claim. [See e.g. ELM 546.142, 546.222, EL-505 Section 11, etc.) These regulations provide guidance to management and are not discretionary.

In the cases that have been raised before the Board, the Postal Service has created a legal fiction called "operationally necessary tasks". The implementation of this criteria, when attempting to locate work for an injured employee, contradicts the agency's established regulations and policies (as has been stated by several arbitrators, most notably *Eisenmenger*). The fact that the Postal Service failed to comply with their own rules and regulations is the very definition of *arbitrary*.

Where it may be true that "there is no general right of appeal to the Board from an agency's failure to comply with its own internal rules" (see *Cowen v. Dept. of Agriculture*, 13 M.S.P.R. 196, 198-99 (1982)), that is not the issue before OPM. The issue is whether the Board must *consider* the agency's regulations when determining whether a denial of a request for restoration to duty was arbitrary and capricious.

It is a general principle of administrative law that agencies should follow their own procedural rules, even when these rules go beyond the rights afforded by any statute or due process. See *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

The agency may not modify a rule *sub silentio* in a manner that is inconsistent with the rule as announced and then defending its decision on the basis of a practice inconsistent with the written rule. See *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359 (1998).

Finally, the agency may not informally adopt a policy that contradicts the terms of a formally adopted rule. See *National Family Planning and Reproductive Health Association, Inc. v. Sullivan*, 979 F.2d 227 (D.C. Cir. 1992).

In order to stay consistent with case law the Board **must** consider whether the agency complied with their own regulations when determining if a denial of a request for restoration to duty is/was arbitrary and capricious. To consider otherwise would create an unresolved legal conundrum that would unnecessarily consume resources of the courts.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of APPELLANT'S BRIEF REGARDING OPM'S ADVISORY OPINION, was/were sent by regular First-Class Mail, this date, to each of the following:

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Submitted on this 24th day of August, 2011.

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