Steven E. Brown,
A PROFESSIONAL LAW CORPORATION

Steven E. Brown, Esq.
Daniel M. Goodkin, Esq.

At The WaterCourt
910 Hampshire Road, Suite G
Westlake Village, CA 91361-2888

Telephones: (805) 496-9777; (818) 706-1555
Facsimile: (805) 496-6368

sbrownesq@federal-law.com
dgoodkinesq@federal-law.com
vicky@federal-law.com
erika@federal-law.com
amber@federal-law.com
website: http://www.federal-law.com

FAX TRANSMITTAL COVER SHEET

IF BOX AT LEFT IS CHECKED, THE INFORMATION CONTAINED IN THIS FACSIMILE IS CONFIDENTIAL AND MAY ALSO CONTAIN PRIVILEGED ATTORNEY-CLIENT INFORMATION OR WORK PRODUCT. THE INFORMATION IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHOM IT ADDRESSED. IF YOU ARE NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE OR AGENT RESPONSIBLE FOR DELIVERING IT TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY USE, DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THE FACSIMILE IN ERROR, PLEASE IMMEDIATELY NOTIFY US BY TELEPHONE, AND RETURN THE ORIGINAL MESSAGE TO US AT THE ADDRESS ABOVE VIA THE U.S. POSTAL SERVICE. THANK YOU.

RECEIVED
2011 AUG 24 PM 4: 21

DATE: 8/24/2011

TO: Clerk of the Board, MSPB

ATTN: Matthew Shannon

FAX: 202-653-7130 **PHONE:**

FROM: STEVEN E. BROWN, PLC:

RE: Amicus Curiae Brief
(Latham v. US Postal Service)

MESSAGE: Please see attached - conform 1st page and return via fax. Any questions please call. Thank you

THIS TRANSMITTAL CONSISTS OF 29 PAGES, INCLUDING THIS COVER SHEET.
IF YOU DO NOT ALL OF THESE PAGES, OR IF THEY ARE NOT LEGIBLE, PLEASE CONTACT THE TRANSMITTER AT THE ABOVE PHONE NUMBER AS SOON AS POSSIBLE.

Steven E. Brown, PLC
Steven E. Brown, Bar #55491
Daniel M. Goodkin, Bar #212178
910 Hampshire Road, Suite G
Westlake Village, CA 91361-28888
Telephones: (805) 496-9777
(818) 706-1555
sbrownesq@federal-law.com

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JAMES C. LATHAM,

Appellant,

DOCKET NO. **DA-0353-10-0408-I-1**

vs.

U. S. POSTAL SERVICE,

Agency.

_____/

AND RELATED CASES

_____/

AMICUS CURIAE BRIEF

The undersigned hereby file their Amicus Curiae Brief with the Board on the above matters.

Steven E. Brown, PLC

Steven E. Brown, Esq.

Daniel M. Goodkin, Esq.

Doris Dabrowski, Esq.

Mary Dryovage, Esq.

WILG

INTEREST OF THE AMICUS CURIAE WILG [1]

Amicus curiae Workers' Injury Law & Advocacy Group [WILG] is an organization dedicated to protecting and advocating the rights of injured workers throughout the United States. WILG has substantial common interests in ensuring that the rights of injured workers throughout the United States are not diminished. Workers' compensation is a form of insurance that provides medical care, compensation and vocational rehabilitation for workers who are injured in the course of employment, while abrogating the employee's right to sue their employer for the tort of negligence.

The rights of injured workers continue to legislatively diminish in the workers' compensation arena. Preserving the rights of injured workers requires vigilant protection. Denying industrially-injured Postal workers the right to restoration to duty must be considered "arbitrary and capricious"; it precludes the federal government from being a model employer of individuals with disabilities, severely punishes the injured worker, and further compounds the devastating nature of the injury.

INTEREST OF THE AMICUS CURIAE STEVEN E. BROWN, DANIEL M. GOODKIN, DORIS J. DABROWSKI, AND MARY DRYOVAGE

Steven E. Brown, Esq. and Daniel M. Goodkin, Esq. of Steven E. Brown, PLC, Westlake Village CA, Doris J. Dabrowski, Esq., of Philadelphia, PA, and Mary Dryovage, Law Office of Mary Dryovage, San Francisco, CA are federal employee rights advocates who represent USPS employees in MSPB and EEOC cases and are members in good standing of their respective state bar associations.

[1] *Amicus curiae* WILG joins the other amicus counsel on this brief in stating that no counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the amicus curiae, its members, or its counsel, has made a monetary contribution to this brief's preparation or submission.

STATEMENT OF FACTS AND ISSUES

Summary of Facts:

As amicus counsel understand the facts based on the Board's request for amicus briefs, Appellant was an employee of the U. S. Postal Service ("USPS") who suffered an on-the-job injury for which he was entitled to workers' compensation benefits under the Federal Employees' Compensation Act ("FECA") from USDOL/OWCP. He was returned to work in a limited duty capacity at USPS, but pursuant to USPS's National Reassessment Process ("NRP") he was later sent home by USPS on the basis that there was "no work available".

The relevant OPM regulation at 5 CFR §353.301(d) requires that an agency (including the Postal Service) "make every effort" to restore a partially recovered employee to limited duty within the local commuting area. The regulation states that "a[t] a minimum, this would mean treating these employees substantially the same as other [disabled] individuals under the Rehabilitation Act of 1973." The Board has required this regulation as requiring agencies to search within the local commuting area for vacant positions to which an agency can restore a partially recovered employee and to consider the employee for any such vacancies [citations omitted]. Conversely, the Board has found that this regulation does not require an agency to assign a partially recovered employee limited duties that do not comprise the essential functions of a complete and separate position [citations omitted].

The USPS's Employee Labor Relations Manual ("ELM") §546.142(a) requires the agency to "make every effort toward assigning [a partially recovered current

employee] to limited duty consistent with the employee's medically defined work limitation tolerance."

USPS's Postal Service Handbook EL-505, Injury Compensation §§7.1-7.2 provides that limited duty assignments "are designed to accommodate injured employees who are temporarily unable to perform their regular functions" and consist of whatever available tasks the agency can identify for partially recovered individuals to perform consistent with their medical restrictions. In Postal Service parlance, "limited duty" refers to work given to industrially-injured employees, while "light duty" refers to work given to employees with non-work-related disabilities. [2]

The Board has commented that it therefore appears USPS may have committed to providing medically suitable work to partially recovered employees regardless of whether that work comprises the essential functions of a complete and separate position.

The Board is aware of one arbitration decision to the effect that the ELM was revised as a product of collective bargaining in 1979 to afford partially recovered employees the right to restoration to "limited duty" rather than to "established jobs" [citation omitted]. The Board is also aware of a number of recent arbitration decisions in which arbitrators have ruled in favor of grievants challenging the discontinuation of limited duty assignments under NRP, on the basis that the agency's actions violated the ELM [citations omitted].

//

//

//

Issues to be determined:

1. May a denial of restoration be "arbitrary and capricious" within the meaning of 5 CFR §353.304(c) solely for being in violation of the ELM, *i.e.*, may the Board have jurisdiction over a restoration appeal under that section merely on the basis that the denial of restoration violated the agency's own internal rules?

2. What is the extent of the agency's restoration obligation under the ELM, *i.e.*, under what circumstances does the ELM require the agency to offer a given task to a given partially recovered employee as limited duty work?

//

APPLICABLE LAW

1. A DENIAL OF RESTORATION IS "ARBITRARY AND CAPRICIOUS" WITHIN THE MEANING OF 5 CFR §353.304(C) SOLELY BY REASON OF ITS BEING IN VIOLATION OF THE RELEVANT ELM PROVISIONS GOVERNING THE AGENCY'S OBLIGATION TO MAKE EVERY EFFORT TO RESTORE PARTIALLY RECOVERED INDUSTRIALLY-INJURED WORKERS.

Query: If an Agency violates its own rules, is it thereby taking an action that is arbitrary and capricious?

A standard of "arbitrary and capricious" necessarily implies that there are in place certain rules or procedures that must be followed, the violation of which cannot be justified. See, *e.g.*, Black's Law Dictionary (9th Ed., 2009),

> "**arbitrary**, *adj.*. 1. Depending on individual discretion; specif., determined by a judge rather than by fixed rules, procedures, or law. 2. (Of a judicial decision) founded on prejudice or preference rather than on reason or fact. This type of decision is often termed *arbitrary and capricious*."

---

[2] *Simonton v. USPS*, 85 MSPR 189, ¶ 8 (2000).

"**capricious**, *adj.* 1. (Of a person) ... 2. (Of a decree) contrary to the evidence or established rules of law."

A. As an initial matter, an Agency "must" follow its own rules.

- Morton v. Ruiz, 415 U.S. 199 (1974) – "Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required. Service v. Dulles, 354 U.S. 363, 388 (1957); Vitarelli v. Seaton, 359 U.S. 535, 539 -540 (1959). The BIA, by its Manual, has declared that all directives that 'inform the public of privileges and benefits available' and of 'eligibility requirements' are among those to be published. The requirement that, in order to receive general assistance, an Indian must reside directly 'on' a reservation is clearly an important substantive policy that fits within this class of directives. Before the BIA may extinguish the entitlement of these otherwise eligible beneficiaries, it must comply, at a minimum, with its own internal procedures."

- Drumheller v. Department of the Army, 49 F.3d 1566, 1574 (Fed. Cir. 1995), 95 FMSR 7011 – (the dissent is quoted here because it gives a good history of the case law requiring federal agencies to follow their own procedures. The majority did not disagree on this point, but rather found that it did not have jurisdiction to review whether the Agency in question had followed its own procedures as it was a security clearance issue):

  "Newman, Circuit Judge, dissenting -
  "Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required. Morton v. Ruiz, 415 U.S. 199, 235 (1974). See Fort Stewart Schools v. Federal Labor Relations Auth., 495 U.S. 641, 654 (1990) ("It is a familiar rule of administrative law that an agency must abide by it own regulation.")
  "The Federal Circuit has regularly held that agencies are charged with following their own regulations. *E.g.*, Dodson v. United States, 988 F.2d 1199, 1204 (Fed. Cir. 1993) ("The Secretary has prescribed Army regulations setting out the Qualitative Management Program (QMP) by which the Army determines whom it will reenlist. Although the Secretary was not required to promulgate QMP regulations, having done so, he is bound to follow them.") (citation omitted); Sargisson v. United States, 913 F.2d 918, 921 (Fed. Cir. 1990) ("Once the Secretary promulgated regulations and instructions and made them the basis for Sargisson's release, his action became the subject of judicial review for compliance with those regulations and instructions, even though he was not required to issue them at all"); Lyles v.

Department of Army, 864 F.2d 1581, 1583 (Fed. Cir. 1989), 88 FMSR 7037 ("The Army must abide by its own regulation, even if it is more rigorous than necessary. And the Board, according to Egan, may review the Army's efforts under this regulation to reposition Lyles.") (citations omitted); Voge v. United States, 844 F.2d 776, 779 (Fed. Cir. 1988) ("It has long been established that government officers must follow their own regulations, even if they were not compelled to have them at all, and certainly if directed to promulgate them by Congress, as is this case."); Boddie v. Department of Navy, 827 F.2d 1578, 1588 (Fed. Cir. 1987), 87 FMSR 7046 ("Employing agencies are required to abide by their own regulations."); Yuni v. Merit Systems Protection Board, 784 F.2d 381, 386 (Fed. Cir. 1986), 86 FMSR 7017 ("Where the rights of the individuals are affected, it is incumbent upon agencies to follow their own procedures.'") (quoting Morton v. Ruiz, 415 U.S. at 235)."

- Campbell v. USPS, 75 MSPR 273, 279 (1997).[3] "An agency is required to act in accordance with the procedures it adopts for itself, and the Board will enforce employee rights derived from such rules, regulations, and collective bargaining agreements. See, e.g., Dwyer v. U.S. Postal Service, 32 M.S.P.R. 181, 185 (1987)."

- Campbell v. United States Postal Service, 94 MSPR 646, 655 (2003). "An employee who is absent from work for medical reasons and who, thereafter, cannot perform the full duties of his position is not constructively suspended. See Rivas v. United States Postal Service, 61 M.S.P.R. 121, 126 (1994). If, however, an employee who is absent due to medical restrictions requests work within those restrictions, and if the agency is bound by agency policy, regulation, or contractual provision to offer available light-duty work to the employee, the employee's continued absence would constitute a constructive suspension appealable to the Board, in the event that the agency fails to offer the employee any available light-duty work."

Question: If such an employee is considered constructively suspended where the agency fails to offer available light-duty work, is it not "arbitrary and capricious" for the agency for fail to make such an offer?

Note: It follows logically that where there is a rule in place and the Agency violates it for its own unrelated (*e.g.* financial) purposes, this is "arbitrary and capricious" as it is an exercise of discretion in direct violation of applicable rules that must take precedence. To hold otherwise would be to grant blanket permission for any agency to

simply violate any and all of its own rules and procedures vis-à-vis its employees for some vague reason like "economic necessity" or "the work is not available". While perhaps not every violation of any rule or procedure set forth in the entire ELM may rise to the level of being "arbitrary and capricious", the particular portions of the ELM at issue in this case are essential to the employer-employee relationship and have been specifically bargained for by Postal employee unions. The issue of what happens to industrially-injured Postal workers is not a minor one, as fully 40% of all work-related injuries to employees covered by the Federal Employees' Compensation Act happen to Postal employees.[4] FECA covers all government employees in all three branches of the federal government and the Postal Service worldwide – approximately 2.7 million employees – and is one of the largest self-insured workers' compensation systems in the world. [5]

B. What rules are set forth in the USPS ELM about assigning work duties that do not constitute a vacant position?

The USPS ELM §546.14 discusses procedures to follow when an employee has partially overcome a work-related disability.

"546.141 General
"The procedures for current employees cover both limited duty and rehabilitation assignments. Limited duty assignments are provided to employees during the recovery process when the effects of the injury are considered temporary. A rehabilitation assignment is provided when the effects of the injury are considered permanent and/or the employee has reached maximum medical improvement. Persons in permanent rehabilitation positions have the same rights to pursue promotional and advancement opportunities as other employees.

---

[3] This case is cited in Broida, A Guide to Merit Systems Protection Board Law and Practice, Chapter 06.01(B)(05)(g) (2011) for the proposition that "The Board will enforce employee rights derived from an agency's own rules.".

[4] See letter from Brian V. Kennedy, USDOL Assistant Secretary for Congressional and Intergovernmental Affairs to Congressman Darrel Issa dated 08/01/11 (copy available on request).

[5] See testimony of Gary Steinberg, Acting Director, USDOL/OWCP on 07/26/11 before the Senate Subcommittee on Oversight of Government Management, etc. available online.

"546.142 Obligation
"When an employee has partially overcome the injury or disability, the Postal Service has the following obligation:
"a. *Current Employees*. When an employee has partially overcome a compensable disability, the Postal Service must make every effort toward assigning the employee to limited duty consistent with the employee's medically defined work limitation tolerance (see 546.611). In assigning such limited duty, the Postal Service should minimize any adverse or disruptive impact on the employee. The following considerations must be made in effecting such limited duty assignments:
(1) To the extent that there is adequate work available within the employee's work limitation tolerances, within the employee's craft, in the work facility to which the employee is regularly assigned, and during the hours when the employee regularly works, that work constitutes the limited duty to which the employee is assigned.
(2) If adequate duties are not available within the employee's work limitation tolerances in the craft and work facility to which the employee is regularly assigned within the employee's regular hours of duty, other work may be assigned within that facility.
(3) If adequate work is not available at the facility within the employee's regular hours of duty, work outside the employee's regular schedule may be assigned as limited duty. However, all reasonable efforts must be made to assign the employee to limited duty within the employee's craft and to keep the hours of limited duty as close as possible to the employee's regular schedule.
(4) An employee may be assigned limited duty outside of the work facility to which the employee is normally assigned only if there is not adequate work available within the employee's work limitation tolerances at the employee's facility. In such instances, every effort must be made to assign the employee to work within the employee's craft within the employee's regular schedule and as near as possible to the regular work facility to which the employee is normally assigned.
"b. *Former Employees*. When a former employee has partially recovered from a compensable injury or disability, the Postal Service must make every effort toward reemployment consistent with medically defined work limitation tolerances. Such an employee may be returned to any position for which he or she is qualified, including a lower grade position than that which the employee held when compensation began.
Note: Placement priority for rehabilitation assignment is the same as for limited duty."

Of the considerations listed, the second one (§546.142(a)(2)) is most relevant to this discussion because it allows for "other work" that is outside of the employee's craft. This Section does not say anything about assignment to a new position, rather it just says other work may be assigned within the facility. OWCP often approves "positions" as suitable, for purposes of suspension of workers' compensation benefits if the employee were to refuse to accept it as suitable alternative employment, when those

positions are listed under the heading of "Modified Clerk" or "Modified Carrier" - which "positions" are not regular biddable positions with position descriptions but rather can be composed of almost any collection of tasks regardless of craft (see discussion of OWCP regulations, below).

C. Since the OPM regulation uses the same language as the ELM with regard to obliging the Agency to "make every effort" to restore the injured employee, does that imply that a violation of the regulation is also a violation of the ELM?

Both the relevant OPM regulation (5 CFR §353.301(d)) and the USPS's ELM (§546.142(a)), cited by the Board, require USPS to "make every effort" to restore a partially recovered employee to limited duty within the local commuting area. The OPM regulation also states that "a[t] a minimum, this would mean treating these employees substantially the same as other [disabled] individuals under the Rehabilitation Act of 1973." [6] By implication, a violation of the regulation may also be a violation of the ELM, as they both use the exact same language. If so, the ELM may require the USPS to, at a minimum, treat these employees substantially the same as other [disabled] individuals under the Rehabilitation Act of 1973."

It is noteworthy that there is currently a massive class action [7] pending at EEOC against USPS specifically charging the Agency with violation of the Rehabilitation Act by sending home partially recovered injured employees, most of whom suffered industrial injuries, on the basis of "no work available". *McConnell v. USPS*, EEOC Case No. 520-2008-00053X. This raises the separate question whether violation of a statute or

[6] While this regulation requires the Agency to consider fully recovered employees for the position, or an equivalent position, held at the time of injury, the regulation uses the term "limited duty" instead of "position" to describe the work which the Agency must consider for partially recovered employees.

regulation can be "arbitrary and capricious", which is beyond the scope of this brief. But to the extent laws such as the Rehabilitation Act are behind the rationale for the relevant ELM Sections and the cited OPM regulations, a brief discussion of some aspects of that Act seems in order.

D. Brief summary of relevant Rehabilitation Act principles

Section 501 of the Rehabilitation Act, 29 U.S.C. §791, requires affirmative action, not merely non-discrimination, on the part of federal agencies. *McWright v. Alexander*, 982 F. 2d 222 (7th Cir. 1992). Courts and the EEOC have interpreted Section 501 to require more than the submission of affirmative action plans. "The Federal Government shall be a model employer of individuals with disabilities. Agencies shall give full consideration to the hiring, placement, and advancement of qualified individuals with disabilities." 29 C.F.R. §1614.203(a). Section 501 imposes a duty upon federal agencies to structure their procedures and programs so as to ensure that handicapped individuals are afforded equal opportunity in both *job assignment* and promotion. *Prewitt v. United States Postal Service*, 662 F. 2d 292 (5th Cir. 1981), quoting *Ryan v. Federal Deposit Insurance Corporation*, 565 F. 2d 762, 763 (D.C. Cir. 1977). Notably, the court observed the obligation of federal employers to afford opportunities of the handicapped to *assignments*, not positions.

The Rehabilitation Act requires the employer to afford a reasonable accommodation to qualified employees with a disability. Reasonable accommodation is a means of alleviating and removing barriers to equal opportunity of disabled employees. The duty to accommodate disabilities requires employers to modify their

[7] The class in this action reportedly includes approximately 100,000 employees. For general information about the action and definition of the class, see www.nrpclassaction.com.

work requirements to enable disabled individuals to have the same opportunities as their non-disabled counterparts. Peebles v. Potter, 354 F. 3d 761 767 (8th Cir. 2004).

For employees with a known disability, the Postal Service must make a reasonable accommodation unless it would impose an undue hardship. To determine a reasonable accommodation, the employer must make a good faith effort to assist the employee to seek an accommodation. When an employee shows that (s)he is disabled and that an accommodation is possible, the burden of proof shifts to the Agency to demonstrate that the accommodation is unreasonable or would cause undue hardship. Unless the employer can prove undue hardship, failure to make a reasonable accommodation to known limitations of an otherwise qualified disabled employee is prohibited by the ADA, 42 U.S.C. §12112(b)(5), 29 C.F.R. §1630.9(a). The only statutory limitation on the employer's obligation to provide a reasonable accommodation is undue hardship. [8]

Procedural irregularities evidence discrimination. Village of Arlington Heights v. Metropolitan Housing Division Corp., 429 U.S. 252 (1977). In U.S. Airways, Inc. V. Barnett, 535 U.S. 391 (2002) the Supreme Court recognized the importance of rules as a factor in determining a reasonable accommodation. Rules create and fulfill expectations of fair, uniform treatment. Yet there is evidence that the Postal Service repeatedly disregards the rules of its own ELM.

//

//

//

[8] Failure to accommodate in violation of the Rehabilitation Act is a prohibited personnel practice under 5 U.S.C. §2302(b)(1)(D). See, e.g., Roberts v. Dept. of Navy, 5 MSPR 387, 389-390, 5 MSPB 403 (1981).

E. What did the Administrative Judge find in this case?

The Appellant in *Latham* argued below that the Agency's failure to follow the ELM constituted harmful error, and this argument was rejected by the Administrative Judge. *James Latham v. USPS*, U.S. Merit Systems Protection Board, Dallas Regional Office, DA-0353-10-0408-I-1, 110 LRP 69771 (September 2, 2010):

> "The appellant argued that the agency committed harmful error by failing to comply with: (1) Article 19 and Article 13 or the collective bargaining agreement between the agency and the American Postal Workers Union which requires the agency to be a model employer; (2) the agency's employee and labor relations manual (ELMS 546.12) which sets out the agency's obligations to employees with compensable injuries; and (3) Executive Order 13548 which requires the Federal government to hire employees with disabilities. To prove harmful procedural error, the appellant must demonstrate that the agency committed an error in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. See 5 C.F.R. §1201.56(c)(3) (2010). The burden is upon the appellant to show that the agency committed an error and that the error was harmful, *i.e.*, that it caused substantial prejudice to his rights.
> "I have reviewed the provisions identified by the appellant and I find that he failed to show how the agency's action violated any of those provisions. Accordingly, I find that the appellant failed to show that the agency committed any procedural error. Assuming *arguendo* that the agency had committed some error by violating one of the cited provisions, the appellant failed to establish that, in the absence of the error, the agency would have reached a different conclusion. The evidence in this appeal establishes that the appellant is unable to perform the duties of his position and there is no position that the appellant can perform that meets the requirements of his work restriction. Thus, I find that the appellant has not met his burden of proof with regard to his affirmative defense of harmful error." [emphasis added]

The AJ appears to have focused on appellant's inability to perform "the duties of his position", yet that is not the proper inquiry when determining whether USPS violated the relevant ELM provisions. See ELM §546.142(a) quoted above.

F. How has the Board previously addressed the argument that failure to follow ELM §546.142(a) is arbitrary and capricious?

Illustrative cases found in our research include the following two cases, in which the full Board addressed the argument that violation of the ELM may constitute arbitrary and capricious action (although the cases did not involve the same specific ELM Section):

Paula White v. USPS, 114 MSPR 386, 110 LRP 41008, 111 FMSR 37, U.S. Merit Systems Protection Board, SF-0353-09-0647-I-1 (July 15, 2010):

> "In this case, the agency's evidence shows only that it searched within the appellant's facility, the Los Angeles ISC, and not within her local commuting area, as required by OPM regulations at 5 C.F.R. § 353.301(d) [emphasis added]. Thus, although the appellant's submissions are insufficient to satisfy the fourth jurisdictional criterion, the agency's submissions are sufficient to render nonfrivolous the appellant's allegation that the denial of restoration was arbitrary and capricious [emphasis added]. "*See Baldwin v. Department of Veterans Affairs*, 109 M.S.P.R. 392, ¶¶ 11, 32 (2008) (the Board may consider the agency's documentary submissions in finding that an appellant had made a nonfrivolous allegation of Board jurisdiction). We therefore find that the appellant has met all of the criteria to establish Board jurisdiction over the merits of her restoration appeal. *Barachina*, 113 M.S.P.R. 12, ¶ 7; *Urena*, 113 M.S.P.R. 6, ¶ 13."

Though the Board ruled in favor of the appellant in terms of its jurisdiction based on a nonfrivolous allegation of arbitrary and capricious failure to restore the employee, the Board went on to hold that it was not relying on appellant's assertion that USPS improperly used an "operationally necessary" standard under NRP in determining if work was available within her medical restrictions – which in effect was a challenge to the way USPS implements NRP in terms of its general outlines and principles.

> "In so holding, we do not rely on the appellant's assertion that the agency improperly used an "operationally necessary" standard under the NRP in determining if work was available within her medical restrictions. It is axiomatic that an agency must determine what work is necessary and available to accomplish its mission. Further, in *Ancheta v. Office of Personnel Management*, 95 M.S.P.R. 343, ¶ 11 (2003), the Board stated that, pursuant to a Postal Service Employee and Labor Relations Manual, a limited duty assignment is "determined based on whether adequate 'work' or 'duties' are available" within the employee's restrictions, craft and current facility or at a different facility if there is no work at her own. That

> is, "limited duty or rehabilitation assignments of current employees are dependent on the extent to which adequate 'work' exists within the employees' work limitation tolerances." *Id.; see also* Okleson v. U.S. Postal Service, 90 M.S.P.R. 415, ¶ 11 (2001) (duties assigned to those in a limited duty capacity "often do not constitute an actual position, but are made up of work available that meets the employee's restrictions")."

Teresa Marquez v. USPS, 2010 MSPB 144, U.S. Merit Systems Protection Board, SF-0353-09-0540-I-1 (July 16, 2010):

> "In this case, the agency's documentary submissions show that its job search encompassed installations within 50 miles of the LABMC but only within the Los Angeles District. The Board has recently found that the arbitrary and capricious criterion is met where the agency's search for available work was limited to the Sierra Coastal District, although the commuting area may include part of other districts ... Therefore, although the appellant's evidence and argument are insufficient to show that the agency's discontinuation of her limited duty position was an arbitrary and capricious denial of restoration, the agency's submissions, which show that it search only within a single district, render the appellant's allegation nonfrivolous. *Id.; see* Baldwin v. Department of Veterans Affairs, 109 M.S.P.R. 392, ¶¶ 11, 32 (2008). ... Accordingly, we find that all four of the criteria to establish Board jurisdiction over this restoration appeal have been met, and the appeal must be remanded for adjudication on the merits. See Barrett v. U. S. Postal Service, 107 M.S.P.R. 688, ¶ 8 (2008)."

The case of Dana Brunton v. USPS, 114 MSPR 365 (July 15, 2010), cited by the Board in its request for amicus briefs, was another case involving an inadequate USPS search (limited to the Sierra Coastal District and within 50 miles of the Pasadena P&DC). While ruling in favor of the Appellant on that issue and remanding the case for hearing, the Board rejected his argument that the process followed by USPS violated a 2002 arbitration decision because the Board is not bound by such decisions – another attack on the entire NRP process. The Board also rejected Appellant's argument that "the agency's alleged fiscal difficulties are immaterial to its obligation to offer him a limited duty assignment." The Board's reasoning on this later point, however, was that such fiscal difficulties "may well affect whether the agency has any available work to

offer him", citing *Taber v. Dept. of Air Force*, 112 MSPR 124 (2009) for the proposition that an agency is not required to assign to a partially recovered employee limited duties that "are not an essential function of his position or that do not comprise a complete and separate position". **Neither the *Brunton* nor the *Taber* case appears to have considered the issue of USPS's obligation to restore such an employee to work that is NOT an essential function of his encumbered position, NOT his regular position, and/or NOT another regular position.** All those types of work must be offered if available, including "limited duty consistent with the employee's medically defined work limitation tolerance" per ELM §546.142(a). Further, neither of these cases considers the issue of how an agency can legitimately claim, for fiscal reasons or any other reason, that specific work duties are not available for the partially recovered employee when they somehow are available to other, non-disabled employees – and the appellant should be allowed to introduce evidence on this and related points. The issue should not be framed as whether fiscal difficulties "may well affect whether the agency has any available work to offer him"; it should instead be framed as whether in fact the agency has any available work to offer that employee.

For a discussion of the four elements to be proven in such failure to restore cases, see *Walley v. Department of Veterans Affairs*, 279 F.3d 1010, 1018-20 (Fed. Cir. 2002); *Bennett v. U.S. Postal Service*, 94 M.S.P.R. 443, ¶ 3 (2003). There are several other Board cases with holdings similar to *White* and *Marquez* regarding the USPS obligation to search within the commuting area, see, *e.g.*, *Linda Chen v. USPS*, 2010 MSPB 129 (July 8, 2010); *Paul Dean v. USPS*, 2010 MSPB 187 (September 14,

2010); *David Kinglee v. USPS*, 2010 MSPB 153 (July 23, 2910); *John P. Sanchez v. USPS*, 2010 MSPB 121 (June 25, 2010).

G. How have MSPB AJs have been handling this same argument?

As reflected in recent reported decisions, with which amicus counsel disagree, MSPB Administrative Judges have been prepared to let the USPS re-shuffle work in apparent disregard of the ELM requirements and then assess if there is anything left over for the partially recovered injured employees. These AJs have in effect ruled that even though the USPS took an injured worker's work away and gave it to someone else, thus causing there to be no work available for the injured worker, it is the province of USPS to decide the most efficient way of getting the work done. ***This of course ignores the issue of whether it was arbitrary and capricious for USPS to take the work away in the first place, given the requirement to "make every effort" to give the injured worker a limited duty assignment.***

In essence, these AJ decisions allow the USPS to ignore the ELM and elevate dubious and unproved efficiency standards over its collectively-bargained obligation to provide limited duty if possible. Given that some of these injured workers have been performing necessary tasks for many years, on a full time basis, the undersigned argue that USPS should at least be required to explain why it was necessary to take the work away now and give it to another employee or employees. For example, were the other employees just standing around idle? Such an unlikely scenario should not be assumed. The USPS should at least have to make a strong showing that its action vis-à-vis an individual employee was operationally necessary - rather than being allowed to issue a blanket proclamation that particular work was no longer necessary and no other

work was available. ***It is patently misleading for an employer to claim a specific work function is no longer necessary when it immediately assigns the same function to another employee.***

Here are representative recent cases found in our research:

Patchamkulam T. Alexander, v. USPS, U.S. Merit Systems Protection Board, Dallas Regional Office, DA-0353-11-0389-I-1, 111 LRP 52138 (July 1, 2011).

HELD: The appellant has not identified facts to support his assertion that the agency violated the collective bargaining agreement or the relevant employee labor provisions. The portion of Section 546.142 ELM quoted by the appellant does not necessarily show that the agency's interpretation that a search for adequate work is an improper standard, nor that assignment of necessary work is disconnected from a determination of worthwhile quantity. Moreover, the appellant's claim that the agency has violated the terms of its handbooks, manuals and regulations by using the standard of adequate work standard as opposed to necessary work has also been previously addressed by the Board:

> "[T]he Board stated that, pursuant to a Postal Service Employee and Labor Relations Manual, a limited duty assignment is determined based on whether adequate 'work' or 'duties' are available within the employee's restrictions, craft and current facility or a different facility if there is no work at [his] own. That is, limited duty or rehabilitation assignments of current employees are dependent on the extent to which adequate 'work exists within the employees work limitation tolerances [emphasis added]."

Note: This decision does not appear to consider the issue of USPS's obligation to restore the employee to work other than within his or her craft.

//

//

White v. USPS, 114 M.S.P.R. 386, ¶ 12 (2010) *citing* Ancheta v. Office of Personnel Management, 95 M.S.P.R. 343, ¶ 11 (2001):

> "Thus, I do not credit the appellant's assertion that the standard used by the agency to search for adequate work was improper or that it violated agency regulations. I find, therefore, that the assertion fails to rise to a non-frivolous allegation that the agency's action was arbitrary and capricious."

Elvin D. Lopez v. USPS, U.S. Merit Systems Protection Board, Western Regional Office, SF-0353-10-0211-I-1, 110 LRP 63866 (April 1, 2010):

> "The appellant asserts that the agency acted in an arbitrary and capricious manner by terminating her limited duty assignment and having others continue to perform her duties. IAF, Tabs 13, 19, 23. The appellant asserts that 12 employees from the Primary East Unit were rotated in to perform the same tasks that she had previously performed in the Loose in Mail (LIM) unit. IAF, Tab 19 (appellant's declaration). She alleges that three employees from the Primary West Unit have also been brought in to perform her former tasks. *Id.* She additionally asserts that a regular employee in the LIM unit, Young, an individual without any medical limitations, now performs her tasks. *Id.*
> "The appellant asserts that this reassignment of work violates the agency's Employee and Labor Relations Manual (ELM) §546.142(a) which provides the agency must make every effort toward assigning an employee limited duty and that to the extent there is adequate work available within the employee's craft, in the work facility to which the employee is regularly assigned and during the hours when the employee regularly works, that work constitutes the limited duty to which the employee is assigned. IAF, Tab 22.
> "As noted previously, the appellant's last limited duty assignment had her performing the following duties: sorting invoices, affixing memoranda of explanation and putting them in envelopes for mailing, opening and sorting incoming correspondence, addressing and sealing envelopes, and putting loose checks in envelopes for mailing. IAF, Tab 5, Subtab 4N, Tab 22. The Distribution Operations Manager, Thompson, certified that he had made every effort to search for and identify any adequate work available for the appellant consistent with her restrictions and located within her work facility. IAF, Tab 18 (Thompson declaration with attachments). Thompson additionally stated that four employees assigned to the LIM unit, specifically, Anthony, Young, R. Rivera and Zamil, are performing tasks previously handled by the appellant as part of their Mail Processing bid assignments. IAF, Tabs 18 (Thompson declaration), Tab 22. Thompson stated that the duties of these four employees includes sorting invoices, affixing memoranda of explanation, opening and sorting incoming correspondence, addressing and sealing envelopes, and putting loose checks in envelopes for mailing. *Id.* Moreover, Thompson noted that other employees with bid assignments occasionally perform these tasks when there is otherwise insufficient work for them to perform. IAF, Tab

18 (Thompson declaration). Thompson declared that the Primary East and West Units had been eliminated so that the primary sorters previously assigned to those positions perform some LIM unit tasks when there is insufficient work for them in their own duty assignments. IAF, Tab 22 (Thompson declaration). The primary duties of these employees is to process mail in the Secondary unit, consisting of keying (coding) parcels weighing up to 35 pounds, manually sorting parcels to container sacks and lifting sacks weighing up to 70 pound. *Id.* Thompson noted that agency work rules require rotating keyers/scanners to floor duties for at least an hour after keying or scanning for no more than two hours. *Id.* As a result, Thompson stated that some of these employees have been working in LIM as part of their floor duties. *Id.*

"Of the employees from the Primary East and West units identified by the appellant, Thompson acknowledged that seven of them, Brooks, Gonzalez, Lagrosa, C. Lee, E. Lee, Oh, and Ramirez, performed some tasks previously performed by the appellant. *Id.* Specifically, Brooks, Lagrosa, C. Lee, and Oh have sorted invoices while Gonzalez, E. Lee, and Ramirez have addressed and sealed envelopes. *Id.*

"It is undisputed that the agency is experiencing an unprecedented reduction in workload due to various marketplace factors resulting in an unprecedented decrease in work hours. IAF, Tab 5, Subtabs 4F, 4G, 4O. While the agency is obligated under 5 C.F.R. §353.301(d) to make every effort to restore, according to the circumstances of each case, a partially recovered employee to duty, I do not find that this requires the agency to adopt inefficient work practices to do so. A modified assignment is not the equivalent of a vacant position. *See, e.g., Ancheta v. Office of Personnel Management*, 95 M.S.P.R. 343, ¶ 12 (2003). I find the agency is not precluded by the ELM from reviewing the assignment of limited duty tasks and reassigning those tasks under the circumstances presented in this appeal. The appellant has failed to explain why the agency was obligated to continue to assign these duties to her under the NRP or the ELM. **Under ELM §546.142 (a), only adequate work that is available is to be assigned to limited duty employees. As the agency was able to have the tasks previously completed by the appellant performed by other employees, either as part of their bid assignments or to prevent other employees from remaining idle after performing their regularly assigned duty positions, these duties were simply not available for assignment to the appellant** (emphasis added). I find the appellant failed to establish the agency acted in an arbitrary and capricious manner in having other employees perform the tasks at issue. *See, e.g., Fitzsimmons*, 99 M.S.P.R. 1, ¶ 11 (appellant's contention that she was informed no work was available upon making request for restoration did not establish that denial of restoration was arbitrary and capricious); *cf. Gilbert*, 100 M.S.P.R. at 383 (appellant met his burden by showing the agency hired other, less qualified employees for positions for which he was qualified)."

Question: If the work is available to be performed by others, how is the exact same work somehow NOT available for the appellant?

Barbara J. Durand v. USPS, U.S. Merit Systems Protection Board, New York Field Office, PH-0353-10-0186-I-1, May 18, 2010, 110 LRP 65635:

> "The appellant's claim that the agency was obligated to continue to assign her limited duties is therefore without merit. Under ELM §546.142(a), only adequate work that is available is to be assigned to limited duty employees. As the agency was able to have the tasks previously completed by the appellant performed by other employees, either as part of their bid assignments or to prevent other employees from remaining idle after performing their regularly assigned duty positions, these duties were simply not available for assignment to the appellant. I therefore find that the appellant failed to establish that the agency acted in an arbitrary and capricious manner in having other employees perform the tasks at issue."

Note: This same circular argument appears to have been copied and pasted into numerous AJ decisions. The undersigned did not review all of them. AJs have been finding that because USPS found other people to do the Appellant's job duties, those job duties were not available to the Appellant. Well of course they were not available - they were taken away and given to someone else!

//

2. THE EXTENT OF THE AGENCY'S RESTORATION OBLIGATION IS COMMENSURATE WITH ITS ELM AND OTHER APPLICABLE LAWS AND REGULATIONS.

It is probably impossible to envision every scenario that can arise in the context of a job offer required to be extended to an industrially-injured employee under these provisions of the ELM. The tasks to be offered will vary, depending on many factors including, primarily, the employee's work restrictions and the details of the work to be done.

The USPS is required, by the terms of ELM §546.142(a) to "make every effort toward assigning [a partially recovered current employee] to limited duty consistent with

the employee's medically defined work limitation tolerance. In assigning such limited duty, the Postal Service should minimize any adverse or disruptive impact on the employee. The following considerations must be made in effecting such limited duty assignments:" The ELM then goes on to clarify in the factors to take into account, in ELM §546.142(a)(1)-(4) as discussed above.

USPS's Postal Service Handbook EL-505, Injury Compensation §§7.1-7.2 provides that limited duty assignments consist of whatever available tasks the agency can identify for partially recovered individuals to perform consistent with their medical restrictions.

Thus the USPS' obligations in this context are set forth in its own ELM in some detail as previously noted. While disputes may arise in specific cases as to whether those obligations have been met, the general principles applicable to these situations have been delineated beforehand and have been the subject of collective bargaining.

In addition, of course, the Postal Service's obligations to restore employees who have partially recovered from an industrial injury are governed by other laws and regulations. One of those laws is FECA, 5 U.S.C. §§8101-8152, which provides:

"Sec. 8151. Civil service retention rights

> "(a) In the event the individual resumes employment with the Federal Government, the entire time during which the employee was receiving compensation under this chapter shall be credited to the employee for the purposes of within-grade step increases, retention purposes, and other rights and benefits based upon length of service.
>
> "(b) Under regulations issued by the Office of Personnel Management -
>
> "(1) the department or agency which was the last employer shall immediately and unconditionally accord the employee, if the injury or disability has been overcome within one year after the date of commencement of compensation or from the time compensable

disability recurs if the recurrence begins after the injured employee resumes regular full-time employment with the United States, the right to resume his former or an equivalent position, as well as all other attendant rights which the employee would have had, or acquired, in his former position had he not been injured or disabled, including the rights to tenure, promotion, and safeguards in reductions-in-force procedures, and

"(2) the department or agency which was the last employer shall, if the injury or disability is overcome within a period of more than one year after the date of commencement of compensation, make all reasonable efforts to place, and accord priority to placing, the employee in his former or equivalent position within such department or agency, or within any other department or agency." [5 U.S.C. §8151 - emphasis added]

Under 5 U.S.C §8151(b)(2), even an employee who was injured more than a year prior is entitled to insist that his Agency "make all reasonable efforts" to place him "in his former or equivalent position". Regulations issued by OWCP make clear that "position" in this context means any work within the employee's medical restrictions that the employee can perform with or without reasonable accommodation:

"Sec. 10.500 What are the basic rules governing continuing receipt of compensation benefits and return to work?

"(a) Benefits are available only while the effects of a work-related condition continue. Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury. Payment of medical benefits is available for all treatment necessary due to a work-related medical condition.

"(b) Each disabled employee is obligated to perform such work as he or she can, and OWCP's goal is to return each disabled employee to suitable work as soon as he or she is medically able. In determining what constitutes ``suitable work'' for a particular disabled employee, OWCP considers the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work, and other relevant factors. (See Sec. 10.508 with respect to the payment of relocation expenses.)" [20 C.F.R. §10.500 – emphasis added]

"Sec. 10.505 What actions must the employer take?

"Upon authorizing medical care, the employer should advise the employee in

writing as soon as possible of his or her obligation to return to work under Sec. 10.210 and as defined in this subpart. The term ``return to work" as used in this subpart is not limited to returning to work at the employee's normal worksite or usual position, but may include returning to work at other locations and in other positions. In general, the employer should make all reasonable efforts to place the employee in his or her former or an equivalent position, in accordance with 5 U.S.C. 8151(b)(2), if the employee has fully recovered after one year. The Office of Personnel Management (not OWCP)
administers this provision.

"(a) Where the employer has specific alternative positions available for partially disabled employees, the employer should advise the employee in writing of the specific duties and physical requirements of those positions.

"(b) Where the employer has no specific alternative positions available for an employee who can perform restricted or limited duties, the employer should advise the employee of any accommodations the agency can make to accommodate the employee's limitations due to the injury." [20 C.F.R. §10.505 – emphasis added]

"Sec. 10.507 How should the employer make an offer of suitable work?

"Where the attending physician or OWCP notifies the employer in writing that the employee is partially disabled (that is, the employee can perform some work but not return to the position held at date of injury), the employer should act as follows:

"(a) If the employee can perform in a specific alternative position available in the agency, and the employer has advised the employee in writing of the specific duties and physical requirements, the employer shall notify the employee in writing immediately of the date of availability.

"(b) If the employee can perform restricted or limited duties, the employer should determine whether such duties are available or whether an existing job can be modified. If so, the employer shall advise the employee in writing of the duties, their physical requirements and availability.

"(c) The employer must make any job offer in writing. However, the employer may make a job offer verbally as long as it provides the job offer to the employee in writing within two business days of the verbal job offer.

"(d) The offer must include a description of the duties of the position, the physical requirements of those duties, and the date by which the employee is either to return to work or notify the employer of his or her decision to accept or refuse the job offer. The employer must send a complete copy of any job offer to OWCP when it is sent to the employee." [20 C.F.R. §10.507 – emphasis added]

"Sec. 10.515 What actions must the employee take with respect to returning to work?

"(a) If an employee can resume regular Federal employment, he or she must do so. No further compensation for wage loss is payable once the employee has recovered from the work-related injury to the extent that he or she can perform the duties of the position held at the time of injury, or earn equivalent wages.

(b) If an employee cannot return to the job held at the time of injury due to partial disability from the effects of the work-related injury, but has recovered enough to

perform some type of work, he or she must seek work. In the alternative, the employee must accept suitable work offered to him or her. (See Sec. 10.500 for a definition of ``suitable work".) This work may be with the original employer or through job placement efforts made by or on behalf of OWCP.

(c) If the employer has advised an employee in writing that specific alternative positions exist within the agency, the employee shall provide the description and physical requirements of such alternate positions to the attending physician and ask whether and when he or she will be able to perform such duties.

(d) If the employer has advised an employee that it is willing to accommodate his or her work limitations, the employee shall so advise the attending physician and ask him or her to specify the limitations imposed by the injury. The employee is responsible for advising the employer immediately of these limitations.

(e) From time to time, OWCP may require the employee to report his or her efforts to obtain suitable employment, whether with the Federal Government, State and local Governments, or in the private sector." [20 C.F.R. §10.515 – emphasis added]

An employee's failure to accept suitable work will result in forfeiture of all future FECA monetary benefits for that injury, for life. 20 C.F.R. §10.517.

The Board will note the similarity of the language about the employer's obligations in these statutory and regulatory provisions to the language of the ELM:

- "make all reasonable efforts" (5 USC 8151(b)(2))
- "make all reasonable efforts" (20 C.F.R. §10.505)
- "make every effort" (ELM §546.142(a)).

//

CONCLUSIONS

The Postal Service's violation of its own ELM in the important area of restoration to duty of industrially-injured Postal workers must be considered "arbitrary and capricious" under the authorities cited above. EEOC's regulations implementing in the Rehabilitation Act have always said that the federal government shall be (or become) a model employer of the disabled. (see 29 C.F.R. §1614.203(a), last amended 05/21/02 – "The Federal Government shall be a model employer of individuals with disabilities.

Agencies shall give full consideration to the hiring, placement, and advancement of qualified individuals with disabilities."). President Obama's 07/26/10 "Executive Order – Increasing Federal Employment of Individuals with Disabilities" [9] reiterates that longstanding policy of the federal government. The Board is urged to consider the implications of its decision in these cases for the policy behind that Executive Order.

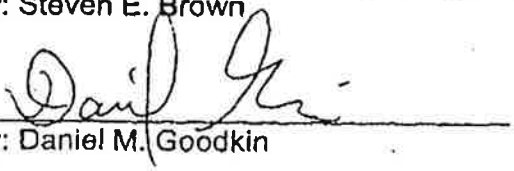
Respectfully submitted:

//

Dated: August 24, 2011

Steven E. Brown, PLC

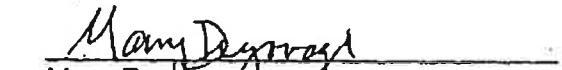
By: Steven E. Brown



By: Daniel M. Goodkin

Amicus counsel joining in this brief:

Doris J. Dabrowski, Esq.
1525 Locust Street, 14th Floor
Philadelphia, PA 19102
215-790-1115
email@dabrowski-law.com
www.dabrowski-law.com



Mary Dryovage
Law Offices of Mary Dryovage
351 California Street, Suite 700
San Francisco, CA 94104
415 593-0095
mdryovage@igc.org
www.mdryovage.com

[9] Available online at www.whitehouse.gov/the-press-office/executive-order-increasing-federal-employment-individuals-with-disabilities

Amicus counsel joining in this brief (continued):

Steven E. Brown, FECA Section Chair, WILG, for
Andrew J. Reinhardt, President, WILG
Reinhardt & Harper, PLC
1809 Staples Mill Road, Suite 300
Richmond, VA 23230
804-359-5500
andy@vainjurylaw.com
www.vainjurylaw.com

PROOF OF SERVICE BY FAX AND MAIL – CCP 1013a, 2015.5

STATE OF CALIFORNIA)
) ss.
COUNTY OF VENTURA)

I am employed in the county of Ventura. I am over the age of eighteen years and am not a party to the within entitled action. My business address is 910 Hampshire Road, Suite G, Westlake Village, CA 91361-2888.

On August 24, 2011, I served the within **AMICUS CURIAE BRIEF** on the interested party(ies) in said action, by facsimile transmission to the party (ies) whose number(s) are listed. For faxed transmissions, the facsimile used complies with CRC Rule 2003(3); no error was reported by the machine, and the transmission report was properly issued by the transmitting machine; and/or (as indicated) placing true copies thereof in a sealed envelope with postage thereon fully prepaid, in a designated mail receptacle of the United States Postal Service at Westlake Village, California, addressed as follows:

MSPB
Headquarters Office
1615 M. Street, NW
Washington D.C., DC 20036-3209

VIA FAX: 202-653-7130
Original & 2 copies via USPS

I declare that I am employed in the office of a member of the bar of this court, at whose direction said service was made.

Executed on August 24, 2011 at Westlake Village, California.

V Camacho

Vicky Camacho, Paralegal