THE CLERK OF THE BOARD
MERIT SYSTEMS PROTECTION BOARD
1615 M STREET NW.
WASHINGTON DC, 20419

JAMES C. LATHAM, et al., Appellants,	)	DOCKET NUMBER DA 0353-10-0408-I-1
v.	)	
UNITED STATES POSTAL SERVICE Respondent,	)	August 17, 2011

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AMICUS BRIEF

PRELIMINARY STATEMENT

The Postal Service violates the law, rules, policies national agreements and its own regulations when denying restoration rights to qualified employees that suffer on-the-job injuries.

STATEMENTS OF LAWFUL AND PROCEDURAL FACTS

The Rehabilitation Act prohibits discrimination based on a person's disability if that person can be accommodated without causing an undue hardship on an agency's operation. However, the Postal Service has been allowed to deny work for several employees without having to prove that the accommodations were causing undue hardship on its operations. Article 2 of the National Agreement between the Postal Service and the American Postal Workers Union states consistent with the other provisions of this agreement, there shall be no unlawful discrimination against handicapped employees as prohibited by the Rehabilitation Act.

The Employees and Labor Relations Manual Part 672.1 (c). reads: The Rehabilitation Act of

1973, as amended, at 29 U.S.C. 791 through 794, forbids federal employers from discriminating against individuals with physical or mental disabilities. It also requires federal employers (1) to adopt an affirmative action plan for the hiring, placement and advancement of individuals with disabilities and (2) to make reasonable accommodations to the known physical or mental disabilities of qualified individuals with disabilities unless the accommodations would pose an undue hardship.

Executive Orders and EEOC Regulations

Executive Order No. 11478 requires federal agencies to establish and maintain affirmative programs of equal employment opportunity for all employees and applicants. EEOC regulations require federal agencies, including the Postal Service, to file Affirmative Employment Plans (AEPs). These plans provide information on the status of protected groups in each agency.

Section 504 of the Rehabilitation Act of 1973 Section 794 (a) states that no otherwise qualified individual with a disability in the United States, as defined in section 706 (20) of Title 29, shall solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of , or be subjected to discrimination under any program or activity receiving Federal Financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Development Disabilities Act of 1978.

The standard used to determine whether the Rehabilitation Act has been violated under this section shall be the standard applied under Title 1 of the Americans With Disabilities Act of

1990 (42 U.S.C., 12111 et seq) and the provisions of Sections 501 through 504 and 510 of the Americans With Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210 as such sections relate to employment. Section 501 prohibits employment discrimination against individuals with disabilities in the federal sector.

EQUAL EMPLOYMENT OPPORTUNITY MANAGEMENT DIRECTIVE EEO MD-715

Section 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 791, requires federal agencies to take proactive steps to provide equal opportunity to qualified individuals with disabilities in all aspects of federal employment. Congress has directed the federal government serve as model employer of people with disabilities. Toward that end, each agency must develop and maintain "an affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities" that, among other things, provide adequate employment opportunities and sets out the ways in which an agency will meet the needs of its employees with disabilities.

THE EMPLOYEES AND LABOR RELATIONS MANUAL (ELM)

The Postal Service in its own policy as outlined in the ELM SECTION 546.142 stipulates in clear words that 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 limitations tolerance, the Postal Service should minimize any adverse disruptive impact on the employee. The Postal Service now argues that it has the right to deny work to employees on limited duty if that employee is performing "make work" duties that the Postal Service has determined to be unnecessary work. This argument

contradicts what is in the ELM. The National Reassessment Process (NRP) Phase 2 Limited Duty Work Status Step 3 under Review of Accepted Modified Assignments (Limited Duty) DAT, states that The District Assessment Team (DAT) composed of designees from Operations, Health &Resource Management (HRM), and Labor Relations must follow USPS regulations set forth in the ELM , 546.142. Under the NATIONAL REASSESSMENT PROCESS (NRP) PHASE 2; LIMITED DUTY FOR NEW INJURIES AND EXISTING MODIFIED ASSIGNMENT SUPERVISORS AND MANAGERS Exhibit 5.1 Modified Assignment Guidelines, Basic Considerations: It is written that The USPS should minimize any adverse or disruptive impact on the employee in assigning limited duty: (ELM 546.142). Again the Postal Service made reference to the ELM section 546.142, but in reality the Postal Service has disregarded and violated the principle contained in 546.142 causing disruptions in the lives of several employees who suffered on-the-job injuries by denying restorations. The ELM 546.21 states that reassignment or reemployment under this section must be in compliance with the applicable collective bargaining agreements. Individuals so reassigned or reemployed must receive all appropriate rights and protection under the newly applicable collective bargaining agreement.

Pursuant to the ELM, 546.222 A partially recovered current or former employee reassigned or reemployed to a different craft to provide appropriate work must be assigned to accommodate the employee's job-related medical restrictions. Such assignment may be to a residual vacancy or to a position uniquely created to fit those restrictions; however, such assignments must not impair seniority rights of PTF employees. Minimum qualification requirements, including written examinations, may be waived in individual cases for former or current employees

injured on duty and being considered for reemployment or reassignment. 5 C.F.R. 353.301(d) mandates that agencies must make every effort to restore in the local commuting area. The Phrase "must make every effort" is a strong mandate. However, the ELM 546.11 issues an even stronger mandate to the USPS in that, pursuant to Section 546.11, the USPS has "legal responsibility" to employees with job-related disabilities under 5 USC 8151 and the Office of Personnel Management (OPM) regulations.

The ELM and EL 505 support the argument that the Postal Service has established an agency-specific rules that provide partially recovered employees with greater restoration rights than those stipulated at 5 C.F.R 353.301(d). (See Drumheller v. Department of the Army, 49 F.3d 1566, 1574 (Fed Cir 1995). Agencies are required to adhere to their own regulations. An article in the Federal Register VOL 76, NO 142/Monday July 25 2011/ Notices, reports that the Postal Service revised the ELM in 1979 to afford partially recovered employees the right to restoration to limited duty rather than to established jobs (NALC v. USPS, Case Number E06N-4E-C 09370199, 16 (2010) (Eisenmenger, Arb)

In the Class Action grievance of NALC v. USPS, arbitrator Jonathan S. Monat ruled that the Postal Service violated Article 7 of the National Agreement between USPS and NALC when it scheduled employee Bob Dibene outside his craft for one hour of work per day. The arbitrator found that the Postal Service failed to make a Good Faith effort to find work for the grievant. Arbitrator Monat ordered the Postal Service to cease and desist violation of the ELM 546 and to stop substituting NRP criteria for the criteria specified in the ELM 546. (USPS Case Number E06N-4E-10001623).

Ms. Susan M. Carney, Director Human Relations Department of the American Postal Workers Union wrote that the APWU has repeatedly pointed out that the language of the ELM requires only that job offers be medically suitable. There is no handbook language which requires medically restricted jobs to be operationally necessary. The Postal Service has unilaterally added this additional criterion, and is using it to improperly deny work assignment to injured employees.

EL 505 HANDBOOK

Pursuant to the EL 505 Injury Compensation Chapter 11, It is the policy of the USPS to make every effort to reemploy or reassign injured-on-duty (IOD) employees with permanent partial disabilities. EL 505, 7.1 and 7.2 provide 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. (Latham v. U. S. Postal Service, MSPB Docket Number DA 0353-10-0408-I-1)

EL 307 HANDBOOK

EL Handbook 307 stipulates Postal Service policy on reasonable accommodation. Section 131 states, The Rehabilitation Act prohibits discrimination against qualified employees and job applicants with disabilities in the federal government, including the United States Postal Service. The Rehabilitation Act also imposes an obligation on the Postal Service to find reasonable ways to accommodate a qualified individual with a disability. The Rehabilitation Act requires the Postal Service to consider ways to change the manner of doing a job to allow a qualified person with a disability to perform the essential functions of the particular job, or to

be considered for a position he or she desires.

WELSHANS v. UNITED STATES POSTAL SERVICE

In an initial decision, dated December 19, 2006, an administrative Judge ruled that the Postal Service acted in violation of its ELM when it charged Welshans for military leave on August 21 and August 23, 1999. On appeal, the Board reversed the Judge's decision. The Board determined that the Administrative Judge improperly applied the 2002 version of the ELM, rather than the ELM in effect in 1999. The Board concluded that the ELM in 1999 clearly authorized the Postal Service to charge non-workdays falling within a period of absence for military duty. Welshans appealed the Board's decision to the United States Court of Appeals, Federal Circuit, No 2008-3088, December 15, 2008. The United States Court of Appeals affirmed the Board's decision. The factor of importance in this case is that both the Merit Systems Protection Board and the United States Court of Appeal, Federal Circuit issued decisions based on whether or not the Postal Service had acted in violation of its Employees and Labor Relations Manual.

LIMITED DUTY MUST BE PROVIDED

Postal employee, Jerome C. Garrett was injured at work on 04/19/2009 while working at the Atlanta, Georgia Crown Road Processing and Distribution Center. The Office of Workers' Compensation denied Mr. Garrett's benefit effective 10/08/2010. The Postal Service ordered Mr. Garret to return to work, and Patsy P. Banks, Health & Resources Management Specialist in a letter dated December 22, 2010 wrote to Mr. Garrett the following statements of policy.

If you are presently working with restrictions, or are to return with restrictions, your limited duty job assignment for this injury is terminated effectively immediately. Any further need of limitations is considered light duty (personal conditions). Limited duty is job related and must

be provided, however, light duty is not mandatory.

The U.S. Postal Service provides reasonable accommodation to qualified individuals with disabilities under the Rehabilitation Act of 1973. If your injury claim has been disallowed and you have been subsequently denied light duty, you may request a review by the District Reassignment/Reasonable Accommodation Committee (DRAC). The DRAC will determine if you are a qualified individual with a disability and recommend possible options. Your request for accommodation must be in writing and addressed to: DRAC, ATTN: SHELIA D. BENFORD, U.S. POSTAL SERVICE, 1605 BOGGS ROAD, DULUTH, GA 30026-9353.

The Postal Service in this letter informed Mr. Garrett that "limited duty is job related and must be provided." The letter states that, "The Postal Service provides reasonable accommodation to qualified individuals with disabilities under the Rehabilitation Act of 1973." This letter was written to Mr. Garrett during the period when several qualified employees with disabilities were being denied restoration to duty. The Postal Service changes its position as is necessary to deny work to compensable employees with little or no regard for laws, rules, contracts or regulations. Such ambiguous actions are arbitrary and capricious.

ARGUMENTS

The U. S. Postal Service used the NRP to circumvent OPM Regulations codified at 5 C.F.R 353, 5 U.S.C. 8151, the Rehabilitation Act, 29 C.F.R 1614.203, EEOC 29 C.F.R. 1614.103, the ELM Sections 546 and 672, Handbook EL-505, Handbook EL-307, The Postal Service and American Postal Workers Union Contract, the Postal Service and the National Association of Letters Carriers, AFL-CIO Contract. Denial of restoration on cases where the Merit Systems Protection Board has jurisdiction is arbitrary and capricious within the meaning of 5 C.F.R. 353.304(c). This is true because the Postal Service has denied restoration to several employees who were performing their assigned jobs most satisfactorily with or without accommodations, and these actions violate internal postal policy as mandated in the Postal Service ELM. The

Postal Service should be required legally to abide by its own regulations and internal policies. This is important because the Postal Service has used the ELM to issue discipline to employees that violate sections of the ELM. Prior discipline has included suspensions and removals. Section 546.11 of the ELM ostensively states that the USPS has legal responsibility to employees with job-related disabilities under 5 U.S.C. 8151 and the Office of Personnel Management's (OPM) regulations. The Board has the authority by law to rule on violations and compliance issues under 5 U.S.C. 8151 and the OPM regulation.

There is the absence of a rational connection between the ELM and the Postal Service's action. In the denial of restorations for qualified employees, the Postal Service acted without proper consideration for its own policies. The ELM is the Postal Service's Bible. Disregard for this Book is sufficient to show arbitrariness and capriciousness. The Postal Service has engaged in abuse of discretion, or otherwise their actions were not in accordance with law, procedures, rule and the Postal Service's own regulations.

CONCLUSION

For reasons stated above, the Board should find that the U. S. Postal Service used the National Reassessment Process to deny restoration to employees that suffered compensable injuries. In doing so, the Postal Service has violated an executive order, laws enacted by the Congress, OPM Regulations, the Rehabilitation Act, regulations that they wrote, applicable handbooks, and the national agreements with the exclusive unions. These violations were so arbitrary and capricious that the Postal Service secretly ended the National Reassessment Process on January 31, 2011. Employees that were denied restorations under this process should be reinstated to duty and otherwise made whole.

Respectfully submitted,

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